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THE THEORY AND PRACTICE OF MODERN GOVERNMENT

THE THEORY AND PRACTICE OF MODERN GOVERNMENT

BY

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IN TWO VOLUMES

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CHAPTER XXI. REMEDIES FOR DEFECTS IN REPRESENTATION

'A political institution is a machine; the motive power is the national character. With that it rests, whether the machine will benefit society, or destroy it. Society in this country is perplexed, almost paralysed; in time it will move, and it will devise. How are the elements of the nation to be blended again together? In what spirit is that reorganization to take place?'

—DISRAELI.

THE THEORY AND PRACTICE OF MODERN GOVERNMENT

CHAPTER XVIII

THE COMMONS

THE FUNCTIONS OF PARLIAMENTS

LOWER Chambers occupy themselves with three main functions: law-making, control of the executive, and investigations relevant to these. Let us take these in turn and observe how the rules of procedure, written and unwritten, provide for them.

Law-making. This falls into two main processes: the making of laws of general concern, or Public Bills; and the making of laws of private concern, or Private Bills. The latter are not treated in this work:[1] we deal only with Public Bills.

Law-making assemblies find themselves in need of (1) guidance in regard to the time they may spend upon particular subjects of deliberation, and the priority in which they are to be considered; (2) guidance by experts upon the substance and drafting of the law and instruction on its probable results; and (3) appropriate rules of deliberation.

Time and Priority. It is clear that there must be some regulation, the minimum of which is to divide the time between majority and minority, and to settle which business is to come first. Further, there may be the need for setting a limit to the amount of time allowed

[1] Cf. May, *Parliamentary Practice* (p. 657 ff.).

(i) The definition of a private, as distinct from a public bill, is that it is for the particular interest or benefit of any person or persons. (When the distinction is not well-marked discussion arises as to whether a Bill is public or private—e.g. 1856 *Local Dues on Shipping*. Certain bills are called 'hybrid'.)

The main features are: that extensive and wide notice must be given by the proposers, that plans in very great detail and evidence must be published, that the appropriate department of state must be notified, that procedure in the House has very little influence upon the Bill, and the Committee stage, the principal stage of private bills, is so designed in the personnel and procedure, as to produce a careful judicial inquiry, supported by demonstrable facts, both parties, proposers and opposers, being represented, if they will, by counsel and experts.

In Germany, in France, in the U.S.A. there is no such special procedure for bills of local or private interest.

to each speaker, and the proportion of time to be spent on each subject. The necessity arises from the size of the assemblies,[1] the complexity and amount of legislation, the abstract equality of every deputy's mandate, and the ultimate need of a majority for decisive action. It is unnecessary to insist upon the amount of work with which modern assemblies are faced: some indication has already been given in the chapter upon State activity. But all of them are more than busy: they are pathologically congested. Business must be treated in order of urgency. Who is to decide that order, when all mandates are equal? That question is not answered by leaving the matter to the free decision of all the equal mandates, for then the answer would be the anarchy of a mob of uncompromising equals. It is answered by the need to secure a majority before anything can be accomplished. This need gave rise to party groupings; and to-day it is one of the forces maintaining party organization. The paramount necessity of a majority causes subordination; and in our own day that subordination is to the leaders of the parties. It is a remarkable subordination, hardly ever disputed, and even when disputed, it is in the manner of those who sigh for a mythologically Golden Age. Party activity in the country, the marshalling of voters into parties, the exchange of votes for programmes, are the bloom of the majority principle. No government can escape from the clutches of its own programme, and continue to be a government. The need for the regulation of time is intensified to the utmost by the large amount of business. The private member has an exceedingly small proportion of the time for business initiated by himself. In England the amount of time allowed by the rules is about 85 per cent. for the Government, and 15 per cent. for the private member; in France, the proportion allowed to the private member is much higher, owing to the time for interpellations; in Germany, the proportion is much the same as in England; the American House of Representatives is perhaps more in the hands of the dominant party than in England. In all countries the power of the private member has deteriorated; he has the power only to follow his party.

Country	Number of Members of Lower Chamber
England	615
France	612
Germany	491
U.S.A.	435
Switzerland	198
Belgium	186
Czechoslovakia	300
Austria	165
Canada	245
South Africa	148
Commonwealth of Australia	76 (in 1929)

PARLIAMENTARY PILOTAGE

Who, then, steers the work of the assemblies and decides upon the priority of debate? It is, of course, the leaders of the dominant parties. In England, the Government decides upon the allocation of time for particular bills; the Opposition may challenge this allocation, but it cannot overturn the Government's decision because it cannot muster a majority against the Government, and if it did it would itself decide upon priority. In England, however, it is one of the recognized customs of Parliament that the Government of the day shall meet the Opposition as far as it possibly can: or in other words, that it shall not use its power intolerantly.[1] This is an ideal pursued for its own value. But governments are also led to this by the unpopularity which meets a government when it uses its right in a narrow spirit. For 'freedom of speech', the 'rights of minorities' and 'careful deliberation' are powerful phrases; they embody objects of worth which can be offset against the good in the laws passed by their suppression; and a government is constrained to such laws with honour. Oppression also brings revenge; and a government which uses it may later suffer from it. Oppositions have always favoured the idea of a committee of both sides of the House to allocate time; governments are naturally less favourable thereto: and these things will become clearer later in this discussion. Until the present the arrangements between both sides of the House have been made by informal talks of the Whips, and ultimately by the fiat of the Government. When the Government is not in a majority, it is interesting to observe, it tends to lose its power over the time-table.[2]

In France, the Government struggles valiantly, sometimes vainly, with the arrangement of a time-table. Pierre enters upon the discussion of the Order of the Day, as though he were about to dissect a dead body, not a living assembly issued from universal suffrage.[3]

An interesting symbol of French parliamentary life is the fact that there is entirely absent from the rules of procedure of the Chamber of Deputies any such rule, as those which, in the Standing Orders of the House of Commons, give so much time to the British Government. *But, and the exception is important, the Constitution itself recognizes to the Government a right of initiative*: Art. 3 (25 February 1875) gives the President of the Republic the right of initiative, and since Presidential decrees require ministerial counter-signature—there is the warrant for governmental initiative.[4] Duguit says that this

[1] Since the rise of closure several suggestions have even been made for the establishment of a committee of both Government and Opposition to allocate time for debate.

[2] It is only necessary to point to the fate of the Labour Government of 1923 and 1929 in England and the Bruning Cabinet in Germany in the summer of 1930.

[3] Pierre, *Traité*, I, 961.

[4] Pierre, op. cit., Vols. I and III, para. 61 ff.

has given the Government the largest freedom;[1] and there is no doubt that for the reasons given by him[2] the French Government has obtained a large measure of parliamentary predominance. The old rule of the House admitted an immediate introduction of the Government's projects before the House,[3] while bills initiated by members, equally acknowledged in the Constitution, had to go to a special commission for report before appearing in the Assembly. Governmental bills received the dignity of being called *projets*, while the bills of members were mere *propositions*: the terms are indicative of a real difference in constitutional significance.[4]

Further, a Government bill, rejected, could be reintroduced without any delay, a member's bill could not be introduced again until three months had elapsed. The rules of 1915 establish these distinctions.[5] Until 1911, however, nothing but informal pressure of the Government upon the groups provided security for a regular current of business. The rules of the House provided only that the President of the Chamber had authority to set up the Order of the Day after consultation, and with the agreement, of the Chamber.[6] There were certain days regularly allowed to commissions to report; but they were often put off by the President and the Chamber, when the Government or non-governmental groups were interested in something else. Further, the doctrine that 'the Chamber is mistress of its procedure' gave legitimacy to sudden demands in the middle of a sitting for changes in the time-table. Thus the Government had no privileged position; excepting the rule that a minister must be heard at any time he wishes, but this had its obvious limits. The Government was compelled to bargain with its component groups and its rivals, working with little more strength than theirs. Further, it was not

[1] *Traité*, IV. 308. [2] Ibid., IV, 305. [3] *Règlement*, 1876, 30.

[4] The proportions are shown by the following figures:

	Projets	*Propositions*
(*a*) Laws *actually passed*:		
1904	161	58
1913	125	43
1925	193	53
1926	192	50
1927	213	75
(*b*) Laws *proposed*:		
1907	251	259
1913	328	287
1920	478	500
1925	328	491
1926	437	443
1927	234	388

These figures were obtained by my student, Mr. Perera, in preparation of a thesis on parliamentary procedure. The 1927 figures are not for the whole year, but for the *session ordinaire* only.

[5] Chap. V, Arts. 20–5. See Bonnard, op. cit., p. 508.

[6] Pierre, op. cit., I, 803 ff.

difficult to upset the Order of the Day by pleading urgency for some bill or resolution, though it was the custom to warn the Government that a request for urgency was to be made, and the President of the Assembly could hold up the discussion until the competent minister attended. The position of the Government and of the Chamber in general under such a system was intolerable, and the abuse of these opportunities of upsetting the Order of the Day, forms a principal ingredient in the criticisms of French parliamentarism before 1914.

The Chamber set out to cure itself, and some improvements were produced by the wholesale reforms of procedure in 1911,[1] 1915 [2] and 1920.[3]

'The presidents of the great commissions, the presidents of the groups, or, in their default, a member nominated by the bureau of the Commission or the group, the vice-presidents of the Chamber, are convoked by the president of the Chamber, each week if it is necessary, to examine the state of business of the Committee. Their conference gives rise to motivated propositions concerning the order of business and the work of the Chamber and the regulation of the daily time-table. The Government, specially warned by the President of the Chamber of the day and hour of the conference, can be heard. The proposition presented by the conference is read during a session by the President, who submits it to the approbation of the Chamber. The time-table as fixed by the Chamber is put up in the precincts of Parliament and published in the *Journal Officiel*. It cannot be modified except by a vote taken either upon the initiative of the Government, or upon a demand signed by fifty members.'

What does this mean? At the Conference are assembled, the knowledge of pending business possessed by the heads of the Commissions, the desires of the different groups, and the policy of the Government (which is, of course, strongly represented in the groups). The Government groups can, if they are strong and loyal to each other, win their way, if not by a vote in the Conference, at least by a challenge to the Order of the Day in the Chamber. The Government derives a certain strength from the fact that it can challenge and perhaps overturn the Order in the House; but it is obviously better for it to bargain with the opposition groups in the Conference rather than try its strength in the open Assembly, always a dangerous procedure. The Government is not put upon better terms than the other groups; it is put on equal terms; it is not in a position, as in England, to extend mercies, happy is it if it can obtain them. So pressed is the Government that, in 1922, all presidents of Commissions were asked by the presidents of the Assemblies to try to send forward a notice of matters to be put down on the agenda at least the evening before the Conference, in order that the Government might have time to look over the dossiers before the meeting.[4] Other things are worth observation

[1] Résolution, 8 Nov. 1911. Cf. Bonnard, op. cit., p. 104.
[2] *Règlement du 4 Février* 1915, Arts. 94 ff. Cf. Bonnard, op. cit., p. 520.
[3] Résolution, 24 May 1920. Cf. Bonnard, op. cit., p. 535 ff.
[4] Cf. Pierre, op. cit., Vol III, para. 803 footnote.

at this point, which will be seen in the full light of their significance later: the President of the Assembly and the Presidents of the Commissions are parts of this steering committee, and it is not in nature that they can be parts of such a conference without being able to exercise an influence upon its decisions. No Government will make trouble for itself when constitutional rights have been accorded to certain officers. The knowledge and experience acquired by these officers makes their consultation by the President of the Republic at a ministerial crisis important. Their importance then gives them power over the Government. Hence these positions are sought after; and one way of obtaining them is to form a group and become its leader. In their due place these facts light up the obscure labyrinths of French politics.

The Conference which regulates the Order of the Day is concerned not only with law but also with interpellations.

The American House of Representatives is bound hand and foot by rules which tie it to a programme determined by the majority party.[1] No government in the English or Continental sense is responsible for the distribution of time and the decision of priority. The shortness of the legislative term and the law-making propensities of the American people, coupled with the procedural confusion between public and private bills, develop such an urgent pressure that the dominant party controls almost every second. In these mechanical debates American party organization reaches its perfection, no pliability being admitted at all. The power elsewhere wielded by a government, came, until 1910, to be wielded by one man: the Speaker of the House, who was, and remains, a deliberate and acknowledged partisan. He led the majority forces, and secured discipline by his power, individually, to nominate members to Committees; as the Committees are the decisive stage of the law in America, the Speaker's power was that of political life and death over the members. By the assignment of bills to appropriate Committees and by the power of 'recognition' of a member in debate, the Speaker enhanced this power; and he and his leading party friends controlled the time of the House. Control was exerted through the formal power of the Committee on Rules, which had the singular power of reporting to the House and changing the procedure and course of measures at any time; of this Committee of five, the Speaker, who nominated the rest, was Chairman. A revolt occurred against this system in 1910; the Speaker was deposed from the Committee on Rules; and all Committees were henceforth to be chosen by the Committee on Committees. The party leaders control the nominations (in caucus)

[1] Cf. Alexander, *History of Procedure of the House of Representatives*; Brown, *Leadership of Congress*; Hasbrouck, *Party Control in the House of Representatives*; Follett, *The Speaker of the House*; Chiu, *The Speaker of the House of Representatives since 1896*; and, for the formal rulings, Hind, *Precedents*.

to this, and get themselves appointed to the Chairmanship of all other Committees. The Speaker's power was thus disintegrated, and given to the controllers of the party caucuses. These leaders decide who shall be Speaker (just as he contributes to the decision who shall lead in his party), they select a 'Floor Leader', that is, a manager of debates and tactics, (in the Democratic Party he is Chairman of the Committee on Ways and Means, and Chairman of the Committee on Committees; in the Republican Party he is *ex-officio* Chairman of the Committee on Committees, and of the informal 'Steering Committee'), they settle also the composition of the Committees and appropriate the chief positions thereon, they (the Republicans) settle who shall compose the 'Steering Committee'. The controlling power, then, is in the majority party, the Speaker (whose aid in controlling the House is indispensable), the Floor Leader, the Chairman of the Committee on Rules and the Chairman of the Committee on Appropriations, and several other party personages who together form the Steering Committee—the name of which is sufficiently expressive of its function. These lead, control, and do business with the little clique of leaders on the other side; they settle the legislative programme with the President of the Republic, when the party controls the executive branches also, direct debate, and get the laws passed. Party caucus decisions supplement their personal influence. The Committee is appointed to superintend generally the operation of the rules of procedure; but its special political business is to appear before the House when the majority party is in distress, and propose a rule that such and such a bill be given priority over everything else.

The German Constitution accords the right of initiative to the Government or to the members of the Reichstag.[1] This terminology indicates the priority of the Government;[2] and tradition, party organization and necessity substantiate their priority. After a discussion of the several possibilities of initiative in the German Constitution—which we shall later discuss—a member of the Reichstag and an acute-minded constitutional critic says:

'In practice the projects of the Government will always be in the foreground. So it is in all parliaments, so has it hitherto been in Reichstag, and so will it be in the future. The majority will naturally leave the initiative to the Government, as its possession. It will do this the more if it is founded upon a coalition, since an agreement within the Cabinet is more easily obtained than by the direct transaction of the parties. Only when the Government is unwilling to appear publicly as the originator of a bill, as was, comprehensibly, the case with the extension of the term of office of the Reich-President, will it allow the parties to act. It may also occur that a party belonging to the coalition Cabinet may take the initiative, as a means of agitating the question, perhaps

[1] Art. 68.

[2] *Vorlagen*. Members' bills are again distinguished by a less important title, *Anträge*—which is little more than a suggestion, and is almost synonymous with the French *proposition*.

because it hopes to succeed with the help of the parties outside the coalition. These will, nevertheless, be exceptional cases. The minority in the Opposition can never accept it as within their duty to come forward with bills, except to cause a demonstration. This is because it can never in general expect the acceptance of its proposals by the majority.' [1]

German parliamentarians describe the process of legislation without a mention of any other initiatory activity than that of the Government,[2] except that the private members' own initiative is often used for urgent laws of minor importance to help the Government to evade the need for consulting the Reichsrat! German Rules of Procedure provide for a Council of Elders (*Ältestenrat*), that is, a council representative of all parties, to plan out, but not enforce, the order of business. This arrangement existed in the old Constitution,[3] and it was found to be particularly useful in a system where so many parties abound. We have seen that in the French system there is an analogue to this. The present rules (3. Arts. 10, 11, and 12) provide for such a Council, composed of twenty-one members, representative of the parties, 'to support the President (of the Assembly) in the conduct of affairs, and especially to bring about an understanding among the groups regarding the order of business. It also regulates the distribution of Committee Chairmanships and their substitutes'. The report on these Articles says that it was considered impossible to give the Council compulsory powers and the old practice had to be followed, that is advisory power only, in which 'after long discussions on a question, nothing came of it if even one member stood out'. Naturally! for that member might be the Government or a minority which hoped for better treatment in the Assembly.

Government Commands Time. Governments cannot avoid some time being taken by the Opposition, as an official body, or by private members belonging to the Government or Opposition, but most of the time is the Government's, and priority is determined by the Cabinet; though, we have seen, there are qualifications upon this in

[1] Freytag von Loringhoven, op. cit., pp 215, 216.

[2] E.g. Lambach, '*Herrschaft der 500*'—Section: *Wie eine Gesetzvorlage entsteht*'. Cf. also Hauffe, *Der Reichstag hat beschlossen* (1931). The number of bills passed a year is as follows:

1920	48	
1921	130	
1922	196	
1923	177	
1924	53	(a disturbed year)
1925	117	
1926	123	
1927	107	
1928	71	
1929	88	

[3] *Bericht des Ausschusses fur die Geschaftsordnung*, Nr. 4411, Reichstag, I, 1920722–3 and 21.

different degrees in different countries. What is important is the general theoretical recognition of Government supremacy, and the general expectation that the place of the private member is one of subordination to the leadership of his group, and of groups to the Government. Even the generous desires of leaders to allow members independent headway is not, and on occasions when it was declared could not, be fulfilled.[1] The results are, on the whole, good. It has often been said that to disperse power is to obscure responsibility. Representative government develops into a farce when power is divided minutely; for the electorate, when called upon to judge, is muddled. We have already seen to what a small extent the electorate can intervene with an independent and positive judgement, even under the conditions where power is divided among and contested by two or three well-known entities, like parties. No subtle argument is needed to demonstrate the necessary failure of the electorate when these parties are many, without a past and perhaps without a future.

It is a disadvantage of modern parliamentary practice that the ordinary member is excluded from the power to determine the course of business, of legislation, of control over the government: every member has something unique, if, in our opinion, silly, to add to discussion, and when the dictation of a government is regularly unchallenged it may fall into error. The question is, however, whether, on the whole, representative government functions better or not without it. We have already seen that members, as a rule, have little to add to discussion; neither special training nor formal profession fits them for it. Nor is there anything so special about the locality they represent that its voice ought to be heard. When it is, indeed, the party caucus knows it, and promptly includes it in the ingredients of the party's policy. It is enough if the opportunity is allowed to men of exceptional talent and character, to denounce the misdeeds of Government and Opposition when the occasion demands; if there is left a right of criticism: and we shall show, later, that for this there is ample—sometimes too ample—freedom, though it is not always used capably. The major necessity is a clear and decisive lead given by a body which can be judged both during and after its actual tenure of office in government or opposition. Again we see that modern democracy demands a great deal of political parties. Without them representativeness and responsibility are denuded of

[1] E.g. MacDonald refused permission for a debate on Lansbury's resolution (dealing with the allocation of time for debate): 'In the present congested state of Parliamentary business, I regret that I can hold out no hope of being able to afford a day for this discussion' (18 June 1924. *Hansard*, Vol. 174, col. 2121); yet in a speech made in the House soon after the formation of the Labour Government he ushered in the golden age of freedom for the private member.

EXPERTNESS AND INTERESTS

Expertness in making laws is composed of two main qualities: a command of the knowledge of their substance, and ability to formulate the results with the minimum of vagueness and unintentional contradiction of other parts of the statute-book. Here again certain technical necessities have thrown the power into the hands of the Government, though arrangements are possible, and do exist, whereby the members of the assemblies may act independently and efficiently.

The difficulties of modern law-making are colossal. The knowledge required for the simplest act is complex and special. Even when that knowledge is available, it does not follow that the same person knows how far existing legal and administrative institutions can be used to obtain the desired results; or how far existing rights will be injured by the new law. The creation of good law involves the careful combination of technical knowledge, an understanding of the law as it is, sound estimates of the expenditure of money and administrative energy required to accomplish the necessary tasks, an appreciation of the general disturbance to be caused; and this involves the co-operation of a number of technically competent authorities. If, indeed, a single member, or a group of members, could muster these requirements, there would still remain a condition which only the Government can fulfil in the modern state: that is, to scrutinize the obvious constituents of the policy and take responsibility for their soundness, and to decide upon their timeliness and harmony with all the other parts in the general plan of legislative, administrative and fiscal evolution. This can only be done by trusted persons: such people as have won the public confidence in a major degree. That, at least, is what the evolution of democratic theory and practice amounts to. It is true that there may be experts outside the government ranks, and there are; but in government the people ask not only for an expert, but for an expert upon experts, even as ordinary men and women tend to seek the opinion of those who know the possible shortcomings of the experts in law or medicine or house-building whose employment they contemplate. Those who are trusted in this matter are, naturally, those who have had long experience of government whether inside or outside of parliament, and those, too, who have won confidence in a high degree by other qualities. This is no other than the Government, in the first resort, and the Administration, the Civil Service, in the second, and we shall see later that it is upon Civil Service that the Government itself relies very largely for its judgement upon the substance of legislation. This is the great second line of defence—the real Second Chamber, as Graham Wallas has called it -of our own day; and without it confidence in parties and their leaders would necessarily suffer serious shocks from time to time.

For the Civil Service is a body of men and women professionally occupied for life in executing the law, watching its effects, its excellencies, its failures, and observing the reciprocal influence of government and society. This is true of all the countries of which we speak; and it is to this court of judgement that the proposals of the public, of members of Parliament, of party leaders, and of ministers ultimately come, and from here that proposals not seldom emanate.

Outside Experts and Representatives of Interests. The sources of law are not, however, confined to Parliament, to the Ministry, or to the Civil Service, for neither their range of knowledge nor of interests is as comprehensive as society itself. We have already seen that parliaments, in a varying degree, only partially reflect the occupational and spiritual composition of the nation; the few men in the Cabinet rise a little, but not much, above the level of talent in parliament itself. Indeed, these have not come into office entirely on their merits as governors; they express desire, will, claims. Nor can the Civil Service do its work unaided. All are obliged to question outside experts and representatives of interests, lest they fall into serious mistakes not only regarding the particular interests, but lest, too, they do an injustice to the vast unseen intricacy called the Public, which remains a phantom while it is unaffected, but suddenly becomes a frenzied monster when molested. This is not an entirely new phenomenon in government; the ancient and the medieval state exhibited the same features. It is impossible for the ordinary institutions of government to penetrate the depths, and master the complexities, of any modern branch of society and law without the special aid of those to whom the matter is one of lifelong and intimate acquaintance, and to whom all things are revealed owing to the vital quality of their interest in the result. Nor is it necessary that Government shall ask for aid: the government is continually pressed by those who observe that the normal political institutions are ignorant or uncomprehending, or that their interests are inadequately represented and likely to be treated with insufficient care.

Hence modern governments—parliament, ministry and civil service alike—have come, on the one hand, to depend to an extraordinary degree upon a variety of institutions to gather information and recommend policy, and, on the other, to be pressed by organized social and occupational groups. To leave these out of account in the analysis of modern law-making and government is entirely to miss its nature, to place an undue importance upon *parliamentary* creativeness, and quite to mistake the character of modern methods of popular representation. In the first category, that of institutions gathering information and recommending policy, are such institutions as Royal Commissions, Departmental Committees, and Select Committees in Great Britain; Investigating Committees and Departmental Com-

mittees in the U.S.A.; Inquiry Commissions in Germany and the Economic Council; and *Commissions Extraparlementaires* in France. To these must be added regular Departmental Advisory Boards which have been set up in various countries, principally in Great Britain, Germany and France. Finally, there are the technical aids in the parliaments, like libraries, and, more important to nascent American development, the Legislative Reference Bureau, and the Legislative Counsel. In the second category are the representative organizations which push an interest, and these operate by deputations to Departments at the request of the latter, deputations to Ministers, and special 'pressure' organizations located in the neighbourhood or precincts of parliament and the Departments, and called by the American name of 'the Lobby'.

Now all these are simply expressions of the extent to which governmental action affects the life of the citizen, and of a social life which far surpasses in scope and depth that for the regulation of which parliaments first came into existence. There is no metaphor which can adequately convey the sense of these great diverse surging waves of life and desire which now have to pass, filtered and controlled, through the narrow channel of the simple institutions of our immediate past. Lower Chambers, Upper Chambers—they are miserably incompetent by themselves to accomplish a tithe of what is needed. They still seem to be important because new ways require time to establish their repute and organization for service, while the old are still ceremonial centres which invite pilgrimages. The real machinery is elsewhere, not occult, yet not in the centre; and with good reason, for in the centre is universal suffrage and its incidental ideology and trappings; it waves the Urim and the Thummim. Life and movement, however, stir in the wings.

Hence, all controversies, as we shall more amply show later, about the decline of parliaments and the need for a Second Chamber, are unreal without a recognition of the actual, often the legal, significance of these accessory institutions. Nor is that all. These institutions themselves, having grown up piecemeal, in response to the special demands of casual events and needs, are now in need of co-ordination; and suggestions are plentiful to this end. Among them is the conception of Industrial or Economic Parliaments, and this we shall discuss later with particular reference to the experience of Germany and France. Before we do that we ought to indicate (we cannot treat in detail) the principal types of institutions which now exist to make representative government more adequate to the demands upon it.

Inquiries: the Social microscope. The form of inquiry selected in Great Britain to cover a wide scope of first-class political importance is the Royal Commission of Inquiry. We are not con-

cerned with its legal form,[1] but with its service. A Royal Commission is usually established when Parliament or the Government or the Department within whose purview the subject falls has become convinced that more information and guidance upon policy are necessary; when a Government, which has been advocating a reform for years (when in opposition), is suddenly shocked by the realization that it is entirely ignorant. It is, of course, needless to say that some inquiries are commenced by a government in order to avoid the difficulty and responsibility of dealing with a subject at once; it is hoped that public opinion will be lulled to sleep by the assurance that the question is under consideration. Every few years the opinion of the few hundred people intensely interested in politics reaches a point where it is generally agreed that something ought to be done. A departmental committee of the Treasury, reporting on the procedure of Royal Commissions, deprecated the appointment of Royal Commissions on subjects on which there is no reasonable prospect of early legislation.[2] This concerned only the expense involved. But there is another consideration. Urgency of the result is a spur to inventive thought—and Commissions have languished into a kind of somatic impotence owing to the lack of this spur. Legislators cast about for a policy, and since 1832 they have more and more come to rely upon the results of investigation by Royal Commissions.[3] The Commissioners are experts or interested persons, with a Chairman, usually of long and distinguished administrative, legislative or judicial experience. The Chairman is of importance to the success of a Commission, since he can direct its inquiries fruitfully, can cause members to co-operate harmoniously, can save its time by the conduct of its sessions, or not, as his experience and personality determine. If he is like Lord Tomlin, Chairman of the Royal Commission (1930) on the Civil Service, an expert in excluding irrelevant evidence, he is particularly useful; yet, as the Report of that Commission ultimately showed, his legislative creativeness and doctrinal boldness may fall far short of his management of procedure.

It is not an easy thing to choose Commissioners: are they to be disinterested experts, or representatives of interests affected? Is it possible to find experts unconnected with bodies affected by the inquiry? In order that the pure truth might be discovered it is clear that on the whole the advantage lies with commissions of disinterested

[1] Cf. Todd, *Parliamentary Government* (1892), Vol. II, Part V, Chap. 4, Sect. 6.

[2] Cf. *Report of the Departmental Committee on the Procedure of Royal Commissions*, 1910, Cd. 5235, p. 6.

[3] A picture of the work of Royal Commissions of Inquiry is to be constructed from Parliamentary Returns: Accounts and Papers, 1856, Vol. 38; Parliamentary Papers, No. 720 of 1850; No. 317 of 1862; No. 342 of 1885; No. 338 of 1896; No. 315 of 1904; No. 159 of 1913; Cd. 7855 of 1914-16; Cd. 8256 of 1916; Cd. 8916 of 1917-18.

experts, or as near to this as one can attain in practice.[1] But governments are obliged to remember that what they are seeking is a policy, not the truth; that is, a practicable plan, given the existing interests which will try to resist any change calculated to damage their situation. Governments, therefore, believe it is better to consult those interests beforehand, in the hope that they will define the extent of acceptable reform, and the concessions they require. Hence, representatives of interests are often put on the Commission; and since they cannot agree with each other, they compromise, making mutual concessions, not always for the public good. Great opportunities have been lost by governments to hear recommendations made on a national basis, through their desire to find an immediately viable plan; for example, in the Royal Commission on Local Government (1923). It would undoubtedly be best if the interests were excluded, but it is difficult to see how this course can be pursued, for once it has been admitted that government is only by the consent of the governed, the representation of interests upon the Commissions is an unavoidable conclusion. I, personally, agree with the opinion of the Committee on Royal Commissions, and I think its way would ultimately be the way of happiness for the general body of the people, but, on the present foundations of government, it can only be accepted by governments with exceptional courage, who are prepared to fight hard against the interests which control many votes. However, a large admixture of independent experts is possible only in the rare cases when the interests have not wide territorial ramifications. When, moreover, a matter is of high urgency, and the parties to it have hopelessly disagreed, as in the coal industry disputes of 1926, the way is open for a commission of experts only.

Commissions function by calling before them independent experts and representatives of interests who give written and oral evidence. Commissions sometimes employ special investigators, as in the Poor Law Commission of 1909; or send assistants, or go themselves, to various parts of the country to obtain evidence by direct observation. A fault of the procedure is that the witnesses never meet each other to discuss their differences before the Commission. Another perhaps unavoidable defect is the truly awful ignorance of some of the Chairmen and Commissioners. The appointment of Commissioners who are interested in and know, if anything at all, only one branch of the subject, seriously wastes time, for the Commission spends day after day in acquiring the most elementary facts,

[1] Cf. *Report*, cited, p. 6: 'And it is of equal or greater importance that those selected as Commissioners should, as far as possible, be persons who have not committed themselves so deeply on any side of the questions involved in the reference as to render the probability of an impartial inquiry and a unanimous Report practically impossible.'

until such time as witnesses have coached them in the problems which they should already have come prepared to investigate. Meanwhile, they lunge about in the hope of coming upon a 'revelation'. Nor have Commissions succeeded in working out a code of procedure with principles at once sound and always adopted. The way to authority is behaviour based upon a systematic recognition of certain principles of inquiry.[1]

However, it cannot be denied that Royal Commissions have been of basic importance in the country's legislative and administrative progress. For even when they have split into majority and minority they have put the issues clearly. It may be that only a unanimous report is a policy, but again a divided report is a record, and that also has its usefulness;[2] and even when recommendations have been foolish, and selfishly established at the expense of the general public, the evidence gathered in the interesting and revelatory form of question and answer has been of immense value. It is a bad mistake to attempt to state the value of Royal Commissions by an *obiter dictum* on the length of time which elapses between the recommendations and their realization. It is now a common impression that this length of time is ten years. But what does ten years mean? That all the recommendations or some of them have been put into practice? Why, indeed, should they be put into practice at all, if they are deemed to be politically bad? All the great pieces of social legislation of the nineteenth and twentieth centuries have been made

[1] The committee of 1910 considered certain interesting portions of such a code: e.g. compulsory powers to send for persons and papers (p. 4). It was recommended that a Circular be sent to the Chairman and members of a commission in order to indicate 'certain general principles respecting the conduct of business of Royal Commissions, in supplement of the Circular of Instructions at present issued by the Treasury and the Home Office' (p. 5).

The man in the street is supposed to be afraid of experts; and the Press certainly feeds this fear by its caricature of the professor-type. Whatever distrust there is, is nowadays overcome by the fact that once parties are well established and leaders trusted, they are able to do many things which are distasteful to the public and persuade it that they are right. Further, the idea of science, the belief that salvation is attainable by trust in the prescriptions of men who devote the whole of their lives to the discovery of the nature of a minute portion of the universe, organic or inorganic, is already one of the most important factors ruling the mind and behaviour of the modern world. This has its disadvantages, for it is often forgotten that knowledge is no substitute for will, and that it is often spurious. But the faults are the faults of juvenile excess. The world is yet young in science and has therefore not yet learnt how far it ought to dominate and to be dominated; and this is particularly the case in the U.S.A., where in the name of science, the common man is too often cheated by those in whom he has trust.

Nevertheless, scientific analysis, and the habit of regarding it as so sacred that it deserves unquestioning obedience, is a most important political factor. It is one which clearly marks off our age from the age of Voltaire and previous times; and it is a factor contributing to efficiency in the machinery of government, and consensus in the direction to be travelled. But it, naturally, cannot cause the lion to lay down with the lamb. For to know all is not to forgive all, nor to concede all; it is often a further warrant for demanding all, and at the most it merely reduces the ambit of disharmony.

[2] Cf. *Report* cited, p. 8.

by Royal Commissions, or the other forms of inquiry, such as Select Committees,[1] or Departmental Committees.[2]

In other countries also there are similar bodies of inquiry set up from time to time, and of much the same nature as those in England. In France, Germany and the U.S.A. much more is done by the regular parliamentary committees and commissions which are normally concerned with legislation, and here the investigations and reporters are purely parliamentary, but evidence is obtained, in written communications from interests concerned (in France and Germany) and in the U.S.A., by personal hearings. In the three countries there are departmental inquiries, instigated by the executive, or especially comprehensive investigations, as in the great Economic Inquiry of 1928 in Germany, the Committee of Financial Experts of 1925 and 1926 in France, and the Hoover Commission of 1930 on Unemployment in the U.S.A., where not only officials or former officials co-operate, but where outside experts and members representative of interests participate.

Principal Defects. A larger view of these investigating bodies, especially the extra-parliamentary bodies entrusted with important inquiries, reveals three qualities which have their advantages, but which also have disadvantages. Inquiries are arranged for only when they are urgently required; their terms of reference are narrow; they cease to exist as soon as they have made their recommendations. We have already suggested that urgency is a constituent of successful inventive thought; it prevents rambling, waste of time on unimportant details, excessive subtlety. Narrowness of the terms of reference is necessary to limit and concentrate attention: the particular question determines these limits. These advantages have

[1] A Select Committee is appointed 'by either House to consider any matters upon which that House may desire information and assistance, or any bill which may be committed to them by that House' (May, *Parliamentary Practice*, p. 468). It is usual to nominate fifteen members, but there have been several larger committees (ibid., p. 471, footnote 4).

Nature of Work—(*a*) Scope:

(*i*) Bills—the Bill itself is the order of reference.

(ii) Other matters—the House has power to enlarge or narrow the order of reference.

(*b*) The Lords do not give select committees authority to send for witnesses or documentary evidence but 'parties are ordinarily served with a notice from a clerk attending the committee, that their attendance is requested on a certain day . . .' (ibid., p. 470).

(*c*) The Commons give when necessary 'power to send for persons, papers and records'. If that power be not given, the documents which may be laid before the committee are handed in by the chairman.

Cases where an order is neglected or disobeyed are reported to the House, and the offender is treated as if he had been guilty to the House itself. (No action was taken by the House in a case which occurred in the Session 1912–13, ibid., p. 84, footnote.)

[2] Departmental Committees are appointed by the Minister of any Department which wishes to conduct an inquiry, usually, but not always, more limited in scope and importance than the questions put before a Royal Commission. They cannot compel evidence.

their reverse side. Urgency may sharpen attention and inhibit preoccupation with the relatively unimportant, but it may also check exploration. The terms of reference may be too narrow: indeed, social and economic relationships are so much parts of one great web that the whole difficulty of economics and sociology is to know at what point to penetrate, and how much to include. If the inquiry is for immediate use—or is said to be—and it is conceived as subordinate to a particular piece of legislation, only the immediate threads connecting it with cognate subjects are examined. It might be of public advantage in the long run, if the terms were wide and the Commission were larger and sat longer. Finally, since the Commission is not a permanent body, there is no one to watch the reception of its recommendations on its behalf, to give an authoritative answer to difficulties of interpretation, or to answer questions which have escaped attention.

Considerations of this kind—the belief that a permanent body of wide membership and large scope would be a useful supplement to existing institutions—have caused the growth of the theory of an industrial or economic parliament, and have even contributed to their establishment in Germany and France. It may be said at once, though the further analysis is reserved for later pages, that in the first-named country at any rate the Council has disintegrated into a number of special committees of inquiry, though permanently linked and functioning, and chosen, by an autonomous procedure, from a large body (200) of representatives of interests. This is not what was intended, but it is the result of practice amending the original intention; and there is now both permanence and width in the large body, and speciality in the committees.

Whether or not the bodies which already exist to inquire and recommend are organized in the best possible manner, their value is indisputably vital to representative government. They provide *expertise* not usually possessed by the members of the assemblies, and they virtually add the representation of interests not otherwise adequately included. They lighten the task of parliaments, as to quantity, and prepare for their final decision, sometimes only for their information, the measured considerations on both sides of legislative proposals. This division of labour leaves to members the application of their *political* mind and will, that is, the pure assertion of their power in the direction they think for the best life of the state. The pure principle of Number still operates, but only after the influence of science has been brought to bear on the confronted multitudes. Here, again, are things undreamed of by Rousseau and the elder Mill. The process of education of parties and electorate never ceases; while parliament is in session, and in the intervals, a constant stream of scientific knowledge flows from commissions and committees, and

the parties, the civil services, and the professional and independent publicists and thinkers seize upon it, analyse it, break it up, and according to their political lights, endow it with meaning. Their desires are modified, deferred, or permanently suppressed, because their partial or complete impossibility is rationally demonstrated. Philosophers cannot be kings, but in our own day they advise and impress rulers through institutions such as we have examined.

Departmental Advisory Councils. A development which has proceeded with that already described is the growth of permanent advisory councils of experts in the Departments of State. This is a clear recognition that legislative and administrative initiative lies with the Executive; an aid to sound thinking has been established at its most frequent source. On a major scale, and as part of the regular administration of the State, this development first occurred in France. It was, perhaps, a product of the fact that the French Civil Service was not until recent years recruited for its efficiency, but was largely a creation of political favouritism. Sound sense must necessarily reside somewhere. Secondly, and this is more important, since it is a more permanent feature, the French have, at least, since the time of the Physiocrats, and it could be maintained even since the time of Louis XIV and Colbert, insisted that experts, the intellectual *élite*, shall provide their law-making. It is observable in the economists who thronged the Court of Louis XVI,[1] in the galaxy of intellectual stars who shone in the firmament around Napoleon, the continuous deference to the *Conseil d'État* (as a supreme court of intellect), and it is observable to-day in contemporary French political theories of vocational representation and democratic competence.[2]

Various departments[3] of state are aided by consultative councils,

[1] Cf. G. Weulersse, *Le Mouvement Physiocratique en France*, II, 155, 249–53.

[2] Its general aspects are discussed in Madariaga's *Englishmen, Frenchmen and Spaniards*. It is further to be observed in the programme of practically every political party, especially the great study groups.

[3] The *Conseil Supérieur d'Hygiène publique* was instituted in 1848 and has since been reorganized, principally in 1906 (*Code Administratif, Petite Collection Dalloz*, 1928, p. 437).

It comprises the president of the *Senate Commission d'Hygiène*, the president of the *Commission d'Hygiène* of the Chamber of Deputies (note this inter-connexion of the Parliamentary Commissions with expert and departmental representatives); a number of high officials of the various branches of the Ministry of the Interior, Finance, Foreign Affairs, Education, Public Works, Labour and Social Insurance, Agriculture, etc., etc., and a large selection from among the various local health administrators and medical schools concerned with public health. Further, the *Association Générale des Médecins de France*, various academies, and the *Conseil d'État*, a worker and an employer, certain others in the medical profession, are chosen by the presentation of several names by their groups and nomination by the minister. Let us give one more example, in an important field of state activity, that of the regulation of commerce and industry. There are two *Conseils* of special importance: (*a*) The *Conseil Supérieur du Commerce et de l'Industrie* (cf. Pic, *Traité Élémentaire de Législation Industrielle*, p. 107), and (*b*) *Conseil Supérieur du Travail*. The former, we are told, had its origin in the plan of Henry IV and Sully, and its history is an

some of which are already over a century old, although naturally their composition and function have been amended from time to time, I do not propose to enter into a detailed analysis of these features. but I wish to point out only their general character. They are composed of two elements: the purely expert, when they may be officials in service or retired, and representative of interests, though this does not necessarily exclude an expertness which would entitle them to be heard on this ground alone. Thus the *Conseil Supérieur de l'instruction Publique* began in 1850 as a body representative of groups whose vital aims would be affected by State control of education: along with professors and professions, which would combine the opinion of an intellectual and judicial *élite*, there was a majority of ministers of different religions, members of the Institute, Councillors of State, Judges; moreover, these members were chosen by their groups. In 1880 the *Conseil* was converted into a body formed by members elected by the various groups within the *teaching* profession. Of fifty-seven members thirteen are chosen by decree, which means by the Minister of Public Instruction. Nine of the thirteen must be members or past members of the administrative or professorial staff of the universities, and the other four chosen from among non-State-supported education. Forty-three members are elected by the Institute and the teachers.

The work of these committees is substantially the same: to advise the Government upon its projects of law and the orders which are designed to give detailed effect to the law. There is no doubt in the mind of instructed Frenchmen of the value of those Councils; they have done important work preparatory to the passage of legislation,[1] and have cleared up difficult questions of law which have been raised in the course of administration. Since they are fairly large bodies, and to convene them often would mean a disturbance in

interesting comment upon the state activity of former days. Its present constitution dates back to 1882. There are no elective members, but the majority of the Council is composed of the Presidents of local Chambers of Commerce. In spite of the representative quality of these members, the care taken to get an equitable geographical distribution of the membership, the lack of an elective element has been the subject of complaint, and it is said that its authority would be greater were there elective members. The *Conseil Supérieur du Travail* included, when it was first created in 1891, only officials and persons nominated by the minister. As a result of protests the *Conseil* was reorganized on various occasions, and is now regulated by a decree of January, 1921. It has seventy-eight members, consisting of thirty-two representatives chosen by employers' organizations, thirty-two representatives of workers' organizations, and fourteen members consisting of three Senators, five Deputies, and members of the Paris Chamber of Commerce, elected thereby, a member of the Federal Committee of *Bourses du Travail* elected by this body, three members of the Institute and the Professors of the University of Paris (nominated by the Ministry) and a member of the *Consultative Chamber of Workers' Associations of Production* chosen by the adherent organizations. Cf. also Barthélemy, *Traité Élémentaire de Droit Administratif*. 10th ed., Paris, 1923, p. 128

[1] Cf. Pic, op. cit., p. 113.

the ordinary administration in which they are engaged, they meet rarely, and current work is left in the hands of a permanent sub-committee. An acute critic, Chardon, has observed that at the Ministry of Public Works great services have been rendered by the Committees, but that there is always the danger that such institutions may be abused when they are made the means of replacing an urgent act by discussion; when the more instructed members are reduced to giving lectures to the rest; when instead of light proceeding from discussion there proceeds an illegitimate child of compromise; when number triumphs over reason;[1] and other criticisms of waste of time have been made.[2]

Conseil d'État. There was a time when the *Conseil d'État* was a sort of grand initiating legislative body. This was under Napoleon.[3] Its very success in those years when it included men like Cambacérès, the Tronchets, Roederer, Portalis, Merlin de Douai, Molé, made it anathema to the Restoration. It fell, to rise again in the Constitution of 1848, as the consultative body for all laws, except financial, and those which were declared urgent, and then it was elected by the National Assembly. Under Napoleon III it became an imitation of its ancient self at the beginning of the century, but the Third Republic, while making it the heart of the French administrative and judicial system, reduced its law-making powers.

In regard to laws, consultation of the *Conseil d'État* is facultative;[4] in regard to those elaborations of the law, which are necessitated by the difficulty of fitting broad rules to a society which consists of many narrow and special interests, it has still great power which we shall describe later. At any rate, at present ministers may consult it[5]—but they do not—at least as regards the subject-matter, the policy, of a bill; that, as we have seen, has been devolved upon special councils attached to each Department. It can, however, advise upon the form of the law, and the effects of new legislation upon the existing codes:[6] a very important function in the modern state, when a legal link added or subtracted vitally affects the character of the whole chain, and where security of existent rights is a part of the incentive

[1] Cf. Chardon, *Les Travaux Publics*, Paris, 1904, p. 52 ff.

[2] Cf. *Annals of the Academy of Social and Moral Sciences. Les Réformes Administratives*, 1929. I have discussed these Departmental Advisory Councils further in an article in *Public Administration*, January, 1931, called 'Officials and the Public'.

[3] Cf. Aucoc, I, 132, and Edmond Blanc, *Napoleon I*, Chap. III.

[4] Law of 24 May 1872, on the Reorganization of the *Conseil d'État*, Part II, Art. 8: 'The *Conseil d'État* gives its advice: (1) Upon projects of law initiated by Parliament which the National Assembly (then a single Chamber) decrees should be sent to it. (2) Upon the project of law prepared by the Government, and which a special decree orders to be submitted to the *Conseil d'État*. . . .' And cf. Pierre, op. cit., Vols. I and III, para. 82–5, for a commentary upon this article.

[5] Pierre comments: 'They (the Government) are not bound in any degree by the collaboration which they have requested' (op. cit., I, 85).

[6] Cf. Aucoc, op. cit., I, 146.

to continue to make them fruitful, and the economic and social edifice is so nicely composed of anticipations that a multitude of forces will act and interact in a certain way, that any brusque and careless movement may cause disturbances far beyond the range of immediate vision or control. We shall have occasion to discuss the work and composition of the *Conseil d'État* later, in dealing first with its powers over administrative orders, and then, further on, with its power in the Civil Service and administrative practice. We may at this point, however, make this observation. Every country has produced something of saving excellence in its machinery of government. However defective the organization, there is somewhere a buttress which saves the whole from falling into ruin. And perhaps at those points the student will find the best means of exploring the characteristic governmental genius of each nation. In France the effective prop is the *Conseil d'État*. Indeed, its brilliant history has caused a number of critics of French parliamentarism to seek relief by a return to the obligatory consultation of the *Conseil* on all laws.[1] But nothing has so far been done.

What we have said about France in regard to Consultative Councils does not require much modification to be applicable to the other countries of this study. But there are some differences of detail respecting the length of time for which such bodies have existed, their composition, and their functions.[2] Of all of them we can say broadly that the representative element is only of recent inclusion, and is the result of the maturity of the representative principle in the modern world, and the recognition that though parliaments may have the plenitude of power they have not the plenitude of wisdom. Nor

[1] These will be found summarized up to 1898 in Michon, *L'Initiative Parlementaire*, p. 310 ff.; and the trend of ideas since then is to be found in the party programmes and such articles as those by Lefas in the *Revue des Sciences Politiques* for 1929–31.

[2] For example, the following Advisory Committees have been created in England:

Board of Trade

(i) Merchant Shipping Advisory Committee.
(ii) Board of Trade Advisory Council.

Ministry of Agriculture and Fisheries

(i) Agricultural Advisory Committee for England and Wales.
(ii) Advisory Committee on Co-operation and Credit.
(iii) (Development Commission)—Advisory Committee on Agricultural Science.

Board of Education

(i) The Consultative Committee.
(ii) Adult Education Committee.
(iii) Advisory Councils of the Victoria and Albert Museum and the Science Museum.
(iv) Burnham Committees.
(v) Secondary Schools Examinations Council.

In the United States there are 'Advisory Boards' in:

(i) The Tariff Commission.
(ii) The Biological Survey (unofficial).
(iii) The Bureau of Internal Revenue (the Board of Tax Appeals is, however, a

should one omit the advisory work done by such bodies as Chambers of Commerce, Agriculture, etc., which in Europe have a public status.[1]

Libraries and Reference Bureaux. No results of a specially fruitful kind are to be obtained from a special analysis of such aids to the legislator as libraries. All parliaments have collections of books and documents and places where fairly quiet study is possible; and the librarians are usually persons able to indicate references and furnish material. But all parliaments seem to be cursed with the same vice: it is impossible for the member to find a convenient and comfortable solitude in which he may work in undisturbed quiet; for the members are so many, and the architecture so old-fashioned that members are condemned to the company of many others who smoke, talk, telephone, or dictate to their secretaries. Only the American Assemblies have approached a dignified and useful accommodation for their members. Of the rest, the English politician's judgement is true: 'The House of Commons is a place where you can't rest and you can't work.'

In the U.S.A. special arrangements are made in Congress and many of the States for expert aid to the legislator, but now for the form rather than the material of bills. Congress itself [2] has created a special branch of the Library of Congress (the equivalent of the British Museum Reading Room) to which members may send questions and whence information and references are sent to them.

The principal experiment of the U.S.A. in this respect is, however, to be found in some of the States, following the lead of Wisconsin. The Wisconsin Legislative Reference Department was established in 1901. It was a part of the Wisconsin Library Commission especially to help legislators. It sought and still seeks to collect the material or references to the history of laws in all the American States and foreign countries from official sources, newspaper extracts, and documents describing the results of legislation. These were so indexed that the legislator could be provided with a volume of relevant material almost as soon as he asked for it. Its efficacy of course depended

judicial rather than an advisory body); and the Bureau of Foreign and Domestic Commerce is in constant consultation with a vast number of bodies representative of various branches of commerce and industry.

There have been numerous *ad hoc* Advisory Committees in connexion with the administration of such acts as: Cotton Futures (1914 and 1922); Oil Regulations (1922); Federal Water Power Act (1920).

For a full account of the importance of these committees, see J. P. Comer, *Legislative Functions of National Administrative Authorities*, New York, 1927, Chaps. VII and VIII; and cf. Childs, *Labour and Capital* (Columbus), 1931, especially pp. 197 ff.

Regarding Germany, cf. my article, 'Officials and the Public', in *Public Administration*, January, 1931.

[1] Cf. Geny, *La Collaboration des particuliers avec l'Administration* (1930), pp. 180 ff.; Tatarin-Tarnheyden, *Die Berufsstände*.

[2] Cf. *Congressional Directory*, Dec., 1930. p. 261, for list of eight 'Consultants' ranging from classical literature to economics. Cf. Weber, *Organized Efforts for the Improvement of Methods of Administration*, p. 353.

upon the intelligent anticipation of the staff and, while this was under the founder, Charles McCarthy, its work became the wonder of America.[1] The result of his experience reveals the mental condition of the ordinary member of parliament, and the conditions of success and failure of such bureaux.

'Our short experience has taught us many things. We have been convinced that there is great opportunity to better legislation through work of this kind —that the best way to better legislation is to help directly the man who makes the laws. We bring home to him and near to him everything which will help him to grasp and understand the great economic problems of the day in their fullest significance, and the legislative remedies which can be applied and the legislative limitations which exist. We must take the theory of the professors and simplify it so that the layman can grasp it immediately, and with the greatest ease. The legislator has no time to read. His work is new to him, he is beset with routine work, he has to have conferences with his friends. Upon political matters he is beset by office seekers and lobbyists, and he has no time to study. If he does not study or get his studying done for him, he will fall an easy prey to those who are looking out to better their own selfish ends. Therefore we must shorten and digest and make clear all information that we put within his reach.'[2]

The essentials of such a scheme were: a carefully selected library conveniently placed; a talented librarian and indexer; compact and accessible arrangement of the material ('legislators have no time to read large books'); complete index of all past bills; records of all 'political' as well as scientific arguments on bills; ('we must remember that he often relies as much upon political or unscientific arguments as we do upon scientific work'); digests of laws, accounts of their operation, bibliographies; a non-political and non-partisan staff; a head of the department trained in the social services—with tact and knowledge of human nature; a trained legislative draftsman; complete devotion as to hours of labour, quick work in an emergency, continuous anticipation of the legislator's needs.

Of course, this experiment was typically American; that is, it was an immediate result of the lack of effective party life, the lack of an expert and impartial Civil Service, of the vulpine operations of the 'lobby', and the rather low level of American State politicians—even in Wisconsin. The effect on American State legislatures of these reference bureaux is very small indeed. The experiment is hardly mentioned in the latest text-books. But some of the conditions which rendered it necessary are present, though perhaps in a different degree, in all democracies.

In Germany an experienced parliamentarian says:

'All of this (the four-storeyed, well-stocked library) is at his disposal. He should use it. Should speak not a word and make not a decision before he

[1] Cf. C. McCarthy, *The Wisconsin Idea*, New York, 1912.
[2] *Bulletin*, Wisconsin Legislative Reference Department, 1908.

has consulted every aid in the archives and the library to test and explore his judgement. Poor Muller! The pressure of the vocation does not allow you so much as to take thought, let alone to come to any profound research of the truth!'[1]

Charles Benoist's voice is one only of a multitude in France which say the same thing: the level of parliament is low, not so much owing to natural unintelligence, but owing to 'lack of preparation, to improvisation of a new mode of life which cannot be improvised'.[2] And there is bitter complaint of the lack of library facilities and other help even in the Commissions. Further, the help of the Civil Service is available only for the Government, and not for private members. If these are ever again to add to the wealth possessed by the party, instead of living upon it, only institutions of this nature can rouse them from their slumbers interrupted only by the division-bells: and for committee-work, particularly, is aid of this kind important.

'THE LOBBY'

So far we have been concerned with the influence upon parliaments of information procured by officially constituted bodies which serve largely in a scientific spirit. In so far as these have influence, it is the influence of fact upon desire. Even when experts are representative of groups whose power affects the legislature, the intention is, in the first place, to educe and express the facts apart from considerations of how many would vote for or against the recommendations based upon them. They are the evidence and policies of the disinterested, as near as can be in a political world. But men are fearful for their interests, and do not easily trust advocates so far removed from them as political parties, members of Parliament, civil servants, and experts. The tendency to scramble for the goods of life, and to defend oneself against attack, never relaxes. Consequently, various groups with well-defined interests specially organize to influence the Legislature and the Executive. They are not satisfied that Government knows enough about them to be fair when subjecting them to the burdens of citizenship. They feel that they must inform members of the true state of affairs, call their attention to the numbers of people who will be affected, and to the opinion of these people upon the suggested measures; they cannot resist the desire to follow the legislator vigilantly and solicitously from the days of his candidacy to parliament, and thence through the various stages of legislation, teaching him the foundations and consequences of their claims.

All goes back to the vast scope of modern state activity and the fact that it is impossible for the existing organs of government themselves accurately to know the substance and the strength of the various

[1] Cf. Lambach, op. cit., p. 91.

[2] *Revue des Deux Mondes*, 15 Oct. 1907, *L'Anarchie provoquée*. Cf. *Les Lois de la Politique Française* (1928).

claims in any given legislative and administrative situation. We should expect to find political self-help where help is otherwise not forthcoming, wherever the ordinary representative institutions are weak in their representative qualities, and wherever groups do not trust these, either because they are weak, or because the groups are voracious. The two, of course, go together, but there are differences of emphasis in different countries. We should, however, notice, before we proceed to discuss the different countries, that all of them have been moving in the same direction in recent years, that is, in the direction of what the Americans have called the 'Lobby', or 'Third House'; all, of course, because industry and social feeling have everywhere shown the same tendencies. Let us discuss group representation before the Congress of the U.S.A., since this country has developed furthest. Both the pathological and the healthy features of that system afford good criteria of the theory and practice of group representation.

The practice is not new.[1] From the beginning of Congress there were people, not elected representatives, who understood and employed the means of influencing Congressmen to pass or obstruct legislation favouring particular interests. With the increase of state activity, and, therefore, of parliamentary power, the 'Lobby' of Washington became more and more the centre of such business. Friends of Congressmen, hangers-on of the departments, former officials, Congressmen who had failed of re-election, lawyers and journalists, and members of Congress themselves, promoted special interests. Women were employed to trim the locks of congressional Samsons. The terms 'lobby' and 'lobbyist' became expressions of contempt and vituperation. To-day the lone wolf has vanished; and there is no slinking about upon unsavoury errands. Contempt is not entirely dissipated, but fear and respect have taken its place. For the 'lobbyist' has come out in the open, advertises himself to the public rather than hides himself from it, and has sources of revenue which are cheerfully disclosed. The groups have vast territorial organizations, some of them nation-wide, and they concentrate in Washington, in large suites of offices, filled with trained officials and experts, executive staffs, and all the modern equipment of research and propaganda bodies, rivalling the minor Departments of State.

It is computed, as a very conservative estimate, that the number of such groups with representatives in Washington is well over 500, and this does not include volunteer spokesmen who come to the capital

[1] Cf. Herring, *Group Representation before Congress* (John Hopkins Press), 1929—a very capable piece of work. Cf. also the more detailed analysis of the American Chamber of Commerce and the American Federation of Labour in Childs, *Labour and Capital*. Cf. also Odegard, 'Lobbies and American Legislation,' *Current History*, Jan. 1930; Luce, *Legislative Assemblies* (1924), Chap. XVII.

from time to time on special deputations to the departments. Congressmen cannot now speak of them except in metaphor. But of the 500 only about one out of five are really effective and 'recognized' by Congressmen as being authentically representative of interests in the country and worth a careful hearing. The delegations represent an enormous variety of interests, and every part of the country: to give a summary view of these interests is almost to reproduce a census of production, every plank in all the political platforms, and a register of social interests. Broadly, they are of two kinds: those whose primary interest is to secure immediately self-regarding benefits—like the American Federation of Labour, the American Chamber of Commerce, the Farm Bureau Federation, and those whose primary interest is to endow others with a material or spiritual blessing—as, for example, the National League of Women Voters, the Daughters of the American Revolution, the Federal Council of Churches of Christ in America, the National Catholic Welfare Council, the American Legion, and the National Council for the Prevention of War.

These organizations were founded and are maintained because action every two or four years at elections was and is deemed insufficient to direct the activities of government. They have elaborated all the technical means they require, they have become experts upon the sources and channels of legislative and administrative power, and harness the aims and impulses of a coherent mass of citizens. They have acquired the name of the 'Third House', the 'Assistant Government'. They have emerged into a public and recognized position, because of the dawning appreciation that parties in a country so vast as the U.S.A. cannot possibly, and certainly do not, do the necessary work of representation of so many different purposes; because Congress has itself admitted the groups into its counsels through the doors of its committees, where the effective work of legislation is done; because the 'muck-raking' period caused the institution of better traditions of government, and made it more difficult for Congressmen themselves to accept the briefs of special interests, while by the Seventeenth Amendment Senators were subjected to a purified process of selection. A thorough investigation of the 'lobby' took place in 1913 after certain scandals had alarmed and disgusted the Congress and the public. The conclusions of the Committee of Investigation recognized the need for public access to Congressmen, but they show that the Committee was rather overawed by this great growth: its severity, though veiled in disarming phrases, was reserved for the 'lobby's' threats against upright Congressmen to contrive their defeat at the next elections, but the propriety of 'lobby' activities was admitted.[1]

[1] 'Your committee is of the opinion that any individual or any association of individuals interested in legislation pending in Congress has the unquestionable right

The War required the concentration of all the national forces, and the Government encouraged the collaboration of representative organizations, since these offered it a convenient and speedy means of communication with, and persuasion of, the people: to all men it spoke in the vivid, telling language of their own daily group-life.

The note of the sinister has not yet passed away from the Press or Congressional descriptions of the 'lobby', but it is in part dimmed by the openness of the lobby's activities. The organizers and the negotiators are naturally those with a special knowledge of the by-ways of legislation and the habits of Congress; the 'legislative agents' as they are now called, and certainly like to call themselves, are recruited from lawyers, journalists, former civil servants, and ex-Congressmen. It will not be an unnatural digression if we explain the source of this last class. Many of the members of either House are professional politicians in the sense that they have no other regular profession which will yield them a livelihood. Hence, the majority are dependent upon re-election or upon an administrative appointment. Alas! Not all can find a berth. But their services are of the highest value to the groups, for 'they know their way about', and they are, moreover, accorded the courtesy of admission to the floor of the House or the Senate. Further, the peculiar arrangement of Congressional sessions permits a Congress to be active for a session after the new biennial elections: this means that men who have been defeated and have no further corporate interest in Congress hold on after they have been electorally discredited. These 'lame ducks', as they are called, are especially amenable to pressure. All in all, these 'legislative agents' are said to be abler than the average Congressman.

How do the groups operate? They invent a name for themselves designed to indicate breadth and nobility of interest and social benevolence, as 'National', 'States Rights', 'American', '. . . of the U.S.A.'; manufacturers have been known to masquerade as farmers, and seven manufacturers announced themselves as a National Association. They proclaim that the country is in their debt, as (the American Federation of Labour), 'Its accomplishments have benefited all the people, for the trade union movement is as wide and deep as human life': or the Chamber of Commerce as, 'What is good for the business

to appear in person or through agents or attorneys before committees and present his or her views upon and arguments in behalf of or against such legislation. . . . But your committee feels assured that whenever any person or association attempts by secret or insidious means or methods, by either giving or encouraging the hope of other reward than that mental and spiritual exaltation which springs from the consciousness of having walked in the light of honest judgement and followed it to its logical end, or by threats of punishment to be vindictively inflicted, then such methods become a menace to the free exercise of the legislator's judgement and the true performance of his solemn obligation and duty, are improper and merit the severest condemnation' (63 Cong., H. rep. 113, pp. 24–5).

is good for the country'; or the Farm Bureau Federation as, 'In reviving and invigorating American farm life, we are regenerating and preserving the Nation', and so on.

The public is informed, educated, badgered, stirred from its own warm and intimate group-exclusiveness, by all the known arts of propaganda, technically perfected. The constituent organizations are informed, badgered, and their feelings whipped up by the paid organizers, and frequent referenda are conducted to stimulate as well as to gauge opinion. Journals appear often and regularly, pamphlets, books, newspaper clippings attractively set up, are circulated in a continuous and broad stream; the cinema and the radio show and shout the group's message. Rural papers are given 'boiler-plate', that is, a plate of print which can be put direct upon the press. This material usually carries no evidence of its source, and there appears to the reader to be genuine news. At all times large amounts of money are spent in this way; on occasion, gigantic sums.[1] Men, like professors, who masquerade before the public as scientists, are subsidized; newspapers are given advertisements in exchange for their sympathies, and even school text-books are insidiously pervaded.

While the public in general is thus made pliable, and when a sufficient following can be counted upon, the lobbyist concentrates upon the Congressman. Every interest has a sympathizer in the seats of power, and he forms the permanent open door for successful infiltration. Further, such Congressmen can give aid by franking the correspondence of the lobbyist, and reading into the *Congressional Record* whatever articles he may compose, so that copies may be obtained at cost-price.[2]

With the sympathetic Congressman there is no difficulty. But the unsympathetic Congressman must be persuaded; and persuasion takes two forms: technical argument, and the threat that, since he misrepresents opinion, opinion will retaliate. Argument has a double virtue: it is intrinsically effective, and gives the Congressman the material for intervention in debate. These, however, are insufficient

[1] *New Republic*, 27 June 1928, *Public Utilities and Public Opinion*; cf. also Childs, for estimates of the regular expenditure of the chief organizations. Odegard, *The American Public Mind* (p. 170, footnote), says that from 1921 to 1929 the United States Beet Sugar Association spent over a half a million dollars to prevent any lowering of the tariff on sugar. For other cases, see Odegard's article cited previously. Cf. also the *United States Daily*, Oct.–Dec., 1929, for revelations of the payments made by American shipbuilding firms to a Mr. Shearer to prevent the acceptance of policies, domestic and international, which would result in a smaller navy.

[2] Cf. Herring, op. cit., pp. 67, 68. In 1906 a Washington newspaper drew attention to the misuse of the frank and an investigation was held (Report and discussion, Cong. Record, 59 Cong. 1 sess., 15 March 1906). On 26 June 1906 an Act (44 Stat. L., 1257) was passed rendering it illegal 'for any person entitled under the law to the use of a frank to lend such a frank or permit its use by any committee, organization or association. . . . Provided that this shall not apply to any committee composed of members of Congress'. Herring comments (loc. cit.): 'The spirit and meaning of this law seems clear enough, but its effect has been nil.'

to move the mind, and besides, Congressmen are so deluged with information of all kinds that the original evil has returned: the solicitous interests are too many for their time and parliamentary capacity, and, further, Congressmen tend to distrust the information on the grounds that it is uncertified and without counter-argument. (They are, of course, incapable of discovering the technical counter-argument themselves; and this is often provided by an opponent group.)

Success lies with those who get in first, and most forcibly. Hence the voice of the people must be conjured up. The method adopted is almost the same in every big organization: the local groups are consulted, more or less authentically, and a policy is produced in Washington, the policy is compared with the attitude of Congressmen, the local groups are informed of the discrepancies, these begin to press upon their members by post, wire, and meetings. A steady fire from the constituencies is concentrated upon the member. He is warned that re-election is impossible if he does not alter his mind. His parliamentary record is ransacked and, with the exaggerations of politics, thrown into the balance at primary and general elections. One lobby helps another, since coercion is more effective when the strength behind it is apparently great. The method is based upon the general truth that in a democracy no elective office is permanently safe: every vote may ultimately count, and therefore all must be canvassed. There are Congressmen whose power is well founded, since their party organization is strong and continuously triumphant; there are others exceedingly fearful of lobbyist activities, for though it may be suspected that opinion has been manufactured, and will shortly disintegrate, no one can be absolutely sure of this. Congressional opinion on the Lobby shows some disgust and not a little fear; it is disgust with the interested nature of the group, and with their coercive drives. There flashes through the Congressman's mind the fact that the active groups may be small, but that they are more effective electorally than the apathetic mass, that unless they are placated they will continue to worry him.

The procedure of Congress gives the lobbyist good opportunities. The most important are in the hearings before Congressional Committees. Decisions on bills are made in Committee, and not in the full assembly, and it has become the practice for Committees to take evidence from all interests concerned by any bill. (The reasons for this procedure are discussed later.) The lobbyist puts written and printed information before the Committee, selects and sends up witnesses, argues his case. It is here, of course, that Congressmen are able to sift the evidence, and to discover the truth about the public support alleged by the lobbyist, and weight is given to the evidence in rough proportion to its authenticity. Congressional pro-

cedure is very intricate and offers very many opportunities of destroying or deferring a bill: the lobbyist concentrates upon these points either for attack or defence.

How effective is the Lobby? This is difficult to answer. It is possible to point to some very important pieces of legislation which result from lobbying activity. Yet of all these it may be said that the full desire of the lobbyist was not granted, and that only when public opinion was thoroughly roused did Congress actually do anything. But this last argument glosses over the fact (which we observed in detail in the matter of the Prohibition movement) that public opinion was roused by the lobbyist and that simultaneously with the operations upon the public there were operations upon Congressmen.

Party organization is placed in a rather curious position by the lobby. It has the ultimate control of policy and priority of business in Congress. It cannot ignore either the threat of a secession of a block of voters or the promise of support. Yet there are so many interests strongly and separately organized that the parties cannot possibly satisfy them all, and can only choose from among them from time to time when it is judged that legislation is inevitable in the near future. Then, as a rule, both parties are found on the same side. Usually they 'straddle' to satisfy as many aspirations as possible, which means that none is completely satisfied, even in the programme. We have already noticed that Committees do most of the legislative work of Congress. The more important of these are seized, in the heyday of the session, with measures espoused by the party. Yet all committees have a large degree of freedom from party domination, that is to say, the party has not made up its mind and has made no promises about a good many things which arise, and does not see the necessity of adopting a party attitude. Here both sides are malleable, and open to argument. Since, also, the Committees at their largest only contain thirty-six members, influence upon them is fairly easily won. That is not all. We have seen that priority before Congress is determined by a small knot of party leaders; it is upon the pliability of these that ultimately depends the success of the lobbyist.[1]

[1] Cf. Brooks, op. cit., p. 204: 'To legislatures all manner of interests must appeal *for special privileges. Some of the latter quite legitimate, no doubt, but if the machine* is in control it may demand a heavy price before they are granted. Others are doubtful or even sinister in character, and in such cases the price exacted is still heavier.'

Kent, op. cit., p. 258: 'There are in Washington, for instance, 145 separate and distinct headquarters, representing different groups or special interests of one sort or another. A large number of these represent special business interests who have representatives whose job it is to look out for their interests in Congress. In other words, they are plain, paid lobbyists, representing a certain class of manufacturers. . . .'

Sait, op. cit., p. 135: 'The Federation (American Farm Bureau) not only drew up a comprehensive program of *legislation, but it established a lobby at Washington*

It is clear that the Lobby in its American form and efficacy is a direct product of American conditions. Nowhere else are the parties so little composed of men vitally connected with the living forces, economic and otherwise, of society—more than one-half the members of Congress are 'lawyers'; nowhere else are the parties so empty of meaning; nowhere else does a system of government pretend to satisfy the diversities of a whole Continent; nowhere else, therefore, is there such a lack of organic integration of citizens and government. What is elsewhere accomplished by the partial dissolution of interests in parties and parliament, is accomplished in America by the explosive approach of two almost exclusive bodies: party and lobby. It is all that parties can do to overcome the checks and balances, the obstacles and separations of American politics; they have no time or energy left for further integrations; and the lobby is the necessary adjunct to the American party system, for it makes the policy while the parties are necessarily occupied with other functions. However, the universal aspects of the lobby must not be missed: division of labour, division of interests, equality of right to make political claims, and the inability of the classic institutions to satisfy them, necessarily cause the production of new organs of defence and attack.

The next step after the creation of a powerful institution is for the State to attempt to control it. In the case of the American Lobby *the State is represented in the first place by Congressmen. Their* attack upon the Lobby results from their fear of it, and their recognition that it may acquire power to which it is not entitled either by its representativeness in terms of genuine numbers, or by the scientific reasonableness of its claims compared with those of the rest of the nation. The proposals, whether in the form of Statutes or as amendments of the rules of Congress, include those (1) to define lobbying, (2) to compel lobbyists to register and disclose their purposes, their employers, and accounts of expenditures, and (3) to prohibit ex-members of Congress to lobby, 'for money or other emolument', within two years of their term as members. These proposals have so far come to nothing.

The questions raised by a Senate Bill reveal the difficulties of legislation.[1] (1) What distinction should be made between people who are paid to lobby, and those, like 'the secretary of some charitable association . . . who comes here mainly as an instance of his general

under Gray Silver. This was not a lobby of the familiar type, secret and devious in its methods.'

Merriam, op. cit., p. 114 (referring to the Congressional investigation of 1913): '. . . It leaves no doubt as to the maintenance of a huge system for reporting upon and influencing legislation not only in the National Capitol, but in the individual Congressional districts (Hearings before Select Cttee. of H. of Rep.).'

[1] 'To require registration of lobbyists and for other purposes.' S. 1095, 9 Dec. 1927, S. rp. 342.

duties'? (2) Ought not a distinction to be made between legitimate propaganda and lobbying?[1] It is believed that the principle of the bill, namely, registration and publicity of the lobbies, would at least squeeze out the corrupt and false organizations.[2]

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England. The social relationships and the group life of England are almost as complex and sub-divided, if less extensive territorially, as those of the U.S.A., and there are consequently as many interests seeking for representation. On the whole, however, an organized lobby of the size, importance and system of that country does not exist. A large number of groups have headquarters near Parliament Street in order to influence the process of government.[3] They are of the same general character as those in America, they approach members of Parliament and send deputations to the Departments. But they cannot appear in Parliament, before Committees or otherwise, though they are asked to give evidence before Royal Commissions of Inquiry or to act as Commissioners,[4] they are normally confined to the Lobby. Their electoral work is not in the form of concentrated propaganda in certain constituencies to secure a stream of communications from constituents to representatives, but takes place in the form of questionnaires during elections, and the rather informal promotion of candidatures of members. Party is too strongly in control of English politics for members to be liable to influence by Lobbyists; Committees are large and their work settled by the parties, nor have they the power of Congressional Committees. There is no loophole between

[1] *Cong. Record*, Senate, 21 March 1928, 4043–6.

[2] In 1927, thirty-two of the States (where lobbying has been stronger and perhaps more corrupt than in the Federation) had laws dealing with lobbying: Sixteen States required registration of agents, etc.; thirteen States required expense accounts to be published; fourteen States prohibited contingent compensation. Wisconsin, Indiana, New York and Ohio had the best-drafted laws. Administration was fairly lax in Ohio and conditions notoriously bad in New York. Wisconsin alone provided an example of a stringent and well-administered law (Influencing of members except by public testimony and statement, being forbidden). The situation appears to be that 'Like many other laws which have been placed on the Statute Book, (they are) only to be forgotten and never to be enforced'. Cf. J. K. Pollock (jun.), *American Political Science Review*, May, 1927, XXI, 335–41.

[3] A small sample: Anti-Socialist and Anti-Communist Union; British Women's Patriotic League; Catholic Truth Society; Catholic Women's League; Church Reform League; Free Trade Union; Income Tax Payers' Society; International Committee to Promote Universal Free Trade; Liberty and Property Defence League; Licensed Victuallers' National Defence League; London Municipal Society; National Anti-Vivisection Society; National Citizens' Union; National Council for Prevention of War; National Union of Ratepayers Associations; National Women Citizens' Association; Navy League; Personal Rights Association; Proportional Representation Society; Six Point Group; United Kingdom Alliance; Freeholders' Society; Railway Companies Association.

[4] A good idea of the variety and range of vocational groups may be obtained by an examination of the list of witnesses appended to the Reports of Royal Commissions and Departmental Committees, e.g. the Royal Commissions on Food Prices, on Road Transport, on Liquor Licensing, Unemployment Insurance, Coal Industry.

the constituencies and Parliament through which the lobbyist can slide to extort concessions. The doctrine of ministerial responsibility, and its organization so that the fullest light of publicity beats everlastingly upon the smallest number of answerable Ministers, makes impossible transactions not publicly advocated, discussed and authorized. The lobbyist is obliged to influence the electorate by continued propaganda, or to appear in the ranks of a party and operate as a member of Parliament, under all the restraints of party and parliamentary discipline, and this often happens. His doctrine must stand a severe test, and even if a clever parliamentary representative of a special branch of industry, or prohibition, or divorce reform, or the League of Nations, found himself upon a committee with that very slight access of power which the private member enjoys in committee, he would need to persuade not only his colleagues, but the Minister, and not only the Minister, but the Civil Servants who stand at the latter's elbow advocating the claims of the country as a whole. In fact, the representatives of the groups are usually members of the House of Commons, which is peculiarly rich, as we have seen, in the representation of the great vocational groups.[1] Any obvious speaking to a brief in the House results in loss of influence, since the House has learnt to beware of, if not exactly to distinguish, special pleading. The English 'lobby' is more effective in Whitehall where deputations are received, and where advice is frequently asked for from interested groups, before legislation is put into a final draft. Such information thus suffers a treble sifting: once by the permanent officials and once by the Cabinet; another, also, by the House of Commons. These, then, are the three hopes of English groups: to teach the public, to obtain direct parliamentary representation, and to persuade the Government. The publicity attending these processes causes the narrow and disreputable groups never to attempt organization, for they know that their chance of success is nil. Further, the rigid separation between public and private bills, with a procedure of judicial examination for the latter, marks off English from American habits, for it gives, even requires, the open appearance of interests and their counsel, to state the nature of the interest, and takes away the remotest hope of success from any interest which is anti-social when tested by judicially-sifted evidence of the balance between the public and the private benefit.

Germany. I have, in another work, made a detailed analysis of the organized interest-groups of Germany.[2] In number and size and technique of organization they are at least on a par with those of

[1] E.g. *Labour and Capital in Parliament* (Lab. Pub. Dept., 1923). In 1928 there were fourteen representatives of City Chambers of Commerce and at least eleven chairmen (or Directors) of such bodies as the Shipowners Association, British Beet Sugar Society, Central Landowners' Association. Cf. Dodd, *Parliamentary Companion*, 1929.

[2] Cf. *Representative Government and a Parliament of Industry.*

America. They had their roots in the German love of organization, in the rapid changes in German industry since 1870, when all branches of economic life were in a process of both natural and statutory evolution, and in the need for organization where the Civil Service was a body of jurists, and parliament had less to give than Ministers and the Emperor. To-day they operate directly upon Parliament by supporting candidates,[1] and upon the Departments of State by deputations. Their pressure upon the Departments of State responsible for their particular branch of interest is continuous and intense. It is welcomed, for 'in the Ministry there resides only the secondary knowledge of the subject, while the primary knowledge lies in industry itself. To reject such suggestions from the groups, *a limine* is extraordinarily difficult and invidious.[2]' Their representation in Parliament is made easier than in other countries because the system of Proportional Representation enables them to influence the party leaders (they are themselves sometimes party leaders) to put them upon the electoral lists in safe constituencies.[3] These influences are largely controlled by the parties, which are strong in discipline and conviction. But one must observe the growth of a number of specifically 'interest' parties, with which we have already dealt in the chapter on Parties. An attempt has been made to conduct group interests and *expertise* into formal and open channels in the Economic Council (the *Reichswirtschaftsrat*), which we discuss later. However, there have been complaints of members who too specially represent certain interests and bills have been introduced to cope with the matter whether by the Rules of Procedure or the general law.[4]

France. France has a long history of the theory of group influence upon government, as witness the names of Benoist, Durckheim and Duguit, to name only the most distinguished, but a much shorter one of actual organization. The notion of national sovereignty and the equality of citizens seems to have acted as an obstacle to the kind of growth we have observed in other countries. There are, however, other causes. Until very recent years the range of State activity was small, for all the French outcry about *étatisme*. Parliament was intensely occupied with issues for which political groups are the better middle-men. The best thing for the interest, especially economic, was to have nothing at all to do with politics. Then, in so far as influence upon Parliament was necessary, this was exercised through Ministers, and implemented by social gratifications. Generally the same kind of atomization which is visible in the French electorate

[1] For example, the Parliament of 1924 included 118 private Trade Association employees (whether employers' or workers' associations) out of a total membership of 493.

[2] Schlegelberger, *Zur Rationalisierung der Gesetzgebung* (1928), pp. 1–6.

[3] E.g. Lambach, op. cit., analysis, p. 83 ff.

[4] Cf. footnote *supra*.

was effective in French economic and social activities. The advisory Councils of which we have already spoken could be approached, and their members influenced, by powerful individuals, and little more than this was attempted. The State itself had created in its local Consultative Chambers of Arts and Manufactures, the Chambers of Commerce and the Chambers of Labour, the normal means of communication upon industrial and commercial matters.[1] That is the Continental fashion: to put the mark and the discipline of the State upon such representative bodies. Further, the proportion of industrial and commercial interests, compared with those in other countries, to agricultural, which needed on the whole less State intervention, was and is small. Since the end of the War there has been an energetic national application to social and economic reforms; not that these have materialized, but the intention at least seems sincere. Concurrently, there arose a number of large associations like the *Comité de liaison des Grandes Associations*, and the *Union des Intérêts Économiques*.[2] These organizations openly seek to influence legislation, and in election campaigns they seek to bind members to their programme. Upon their directorate are often distinguished members of Parliament, more particularly of the Senate, and there are connexions between the Parliamentary Commissions and the Associations. Neither French political logic, nor the conditions of the day, have allowed these voluntary organizations to remain masters of the field, for, following the example of Germany, and much influenced thereby, a comprehensive Economic Council has been formed. We later compare its composition and effect with the German Economic Council.

* * * * * * *

We have now briefly reviewed the existing means whereby members of Parliament supply themselves, and are supplied, with the expertness necessary to the creation of law. *We may conclude that were it not for these agencies parliamentarism would be entirely incompetent to the tasks assumed by the modern state We may also conclude that were it not for the Civil Service and modern parties led by a few talented men and helped by their research bodies it would be necessary to demand of the ordinary elected deputy a critical ability which he does not now possess and which he could not acquire without years of careful study.* We must remember this when we treat of the current slogans 'the decline of parliaments' and the 'crisis of democracy': it is an apparent decline only, an illusion produced by the new tasks imposed upon institutions which have not declined, but remained the same, and

[1] Pic, op. cit., p. 122 ff.; and article by Finer, *Officials and the Public*, cited. Cf. Geny, *La Collaboration des Particuliers avec l'État* (1930).

[2] See Carrière et Bourgin, *Manuel des Partis Politiques en France* (1924), p. 207 ff; Carrière, *La Representation des interets et l'importance des elements professionels dans l'évolution et le gouvernement des peuples* (1917).

the rise of other institutions with good credentials which have not yet been received and granted a fully acknowledged place in the court of the sovereign.

DRAFTING

It is not enough to have rightly determined the substance of the law, for it may be entirely ruined by the manner of its formulation. Both Montesquieu[1] and Austin[2] placed the highest value upon the technical drafting of the law, quite properly when one considers the problems it raises. No law can be made without affecting, by contradiction or amendment, other parts of the Statute-book or case-made law. The new law must be formulated with due reference to these, else inconsistencies and litigation will follow. Secondly, the law requires careful definition to embody the intention of the legislator with the least amount of ambiguity, for the law courts interpret mainly by following the letter of the law and not by reference to the intention of the legislator. For how should one discover that intention? By parliamentary debate? (it is vague and one-sided); by numbers voting? (many may not have heard the debate and some may not have understood it). The judges are wise in looking only to the letter of the law, but we have already learnt that this is an epoch of statutory revolution regarding property, freedom and morals, bursting with the gravest problems.[3] Moreover, it is desirable that the law should be as simply, that is, as economically, worded as possible. If this, then, is badly formulated, the very intention of the legislator may be reversed; and *casus omissi* are the regular bread and butter of law courts. Serious accidents have occurred; ludicrous inconsistencies are reported from all countries; and to avoid them requires great care and skill.[4]

Hence the tendency to place bill-drafting in the hands of specialists, who become skilled with practice, and who are able to use terms which have already acquired a settled definition in the Courts of Law,[5] and who by centralizing the process, are able to exclude unintentional

[1] Cf. *Esprit des Lois*, Bk. XXIX, Chaps. XVI–XIX.

[2] Cf. *Jurisprudence*, 1136: 'I will venture to affirm, that what is called the *technical* part of legislation is incomparably more difficult than what may be styled as the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so construct the same law that it may accomplish the design of the law givor.'

[3] Cf. Chap. on *The Separation of Powers*, supra; cf. also Chap. XXVI, *Legal Remedies against Public Administration*, infra.

[4] Lee in *Columbia Law Review*, April, 1929, 'The Office of the Legislative Counsel', p. 390: 'The essential and the time consuming elements are analyses of the problems and of the existing law and the administrative and technical details—in order that the general substantive policies may be built upon a sound understructure that will make *practicable the accurate execution of the policies*. . . . *It is the rare exception* when a simple policy cannot be simply expressed. Usually the explanation of complex, indefinite, disorderly statutes is attributable to the existence of a comp'ex policy, whose ramifications cannot be definitely ascertained, or else is attributable to political or parliamentary exigencies.'

[5] As, for example, in the Rating and Valuation (Apportionment) Act, 1928, in the definition of 'industrial' hereditaments, which were to be de-rated.

and mutually destructive provisions. In England, for Government measures only, and for those taken over from private members by the Government, a special office of draftsmen, Parliamentary Counsel to the Treasury, are employed. The office has had a distinguished history since its creation in 1837, Lord Thring and Sir Courtenay Ilbert having been its incumbents for years.[1] The Minister and the leading officials in the Department responsible for the bill co-operate with Counsel in the inception of the bill, and then continuously with amendments which arise during its passage through Parliament; indeed, they are conveniently present during debates in the House and in Committee. Moreover, Counsel provide memoranda on the clauses for the instruction of the Minister, and search out and make plain the history, and the connexion with other departments of State, especially of the Treasury. It is a vital, and an intricate, and highly technical business. The value of the office of draftsmen has been thus assessed by Bryce: it produced harmony in the laws; a form at once shorter, clearer, better expressed, less likely, all things being equal, to provoke litigation; a means of consultation on the probable legal effects of contemplated proposals and of reports upon existing law.[2] In Germany there are no special draftsmen, and the leading departmental civil servants are responsible, and, indeed, this is why legal studies form so large a part of the German Civil Servant's training, but it has been suggested that the Ministry of Justice should undertake the service in order to avoid ambiguous clauses and unnecessary additions to the law. In the U.S.A. until 1915 there was no aid but the very casual help of the administrative departments with their legal advisers when 'administration' bills were being pressed. In 1918[3] special officers, called Legislative Counsel, were created, one each for the Senate and the House of Representatives, with adequate assistants to 'aid in drafting public bills and resolutions or amendments thereto on the request of any committee of either House of Congress'. In France,[4] since consultation of the *Conseil d'État* was made permissive, instead of compulsory, in 1878, Governments have relied upon the unsystematic aid of Departmental officials, ministers' private secretaries, academic experts, commissions of inquiry, and experts who happen to get on to the Parliamentary Commissions. In one or two departments, some officials are especially entrusted with bill drafting, but this is not common.

It is noteworthy that private members have no free access to the bill draftsmen—not in England, and in the other countries only through the Committees or Commissions.

[1] Cf. Ilbert, *Legislative Forms and Methods* (1901); *The Mechanics of Law Making* (1911); Thring, *Practical Legislation* (1877).

[2] United States Senate Report, 62nd Congress, No. 1271 (1913); 'Legislative Drafting Bureau and Reference Division', p. 74 ff. [3] Cf. Lee, loc. cit.

[4] Cf. Barthélemy, *Problème de la Competence dans la Democratie*, Chap. V.

CHAPTER XIX

DELIBERATION AND PROCEDURE

THE law has been conceived; it is drafted; outside influences have been at work and remain vigilant. How does the assembly proceed to convert it into law? What rules does it impose upon itself, and for what motives?

Rules of procedure have always been considered with peculiar regard by parliamentarians. For long, the right to make the rules without the intervention of the monarch was regarded as a test of the independence of parliament, and was one element in the battle for self-government; it was possible for a parliament with such rights to bind the Crown and its Ministers to its will, since a price could be exacted for the lowering of each obstacle. But in our own day procedure has an even more solemn meaning: it is the self-control of the sovereign people, the voluntary surrender of all parties to common considerations of utility and justice.[1] This is implicit in the rules and habits of the various parliaments, and can be thus summarized:

1. Deliberation should be arranged so as to avoid members being taken by surprise.
2. There must be sufficient deliberation.
3. The majority must have the ultimate power.
4. The minority must not be oppressed.
5. Deliberation must be orderly, solemn and genuine.
6. The good faith of all speakers must be assumed.

[1] Cf. Anson, *Law and Custom of the Constitution* (1922), I, 184–6: 'It is strictly true to say that the House has the exclusive right "to regulate its own internal concerns", and that, short of a criminal offence committed within the House or by its order, no Court would take cognizance of that which passes within its walls.' The most recent illustration of this statement is the case of *Bradlaugh v. Gosset* (1884), Q.B.D. 271. Cf. May, pp. 140, 147; and Redlich, *The Procedure of the House of Commons*, II, 5, 7.

The German Constitution of 1919, by Art. 26 prescribes: 'The Reichstag chooses its President, Vice-President and its Secretaries. It regulates its own procedure.' Cf. Vogler, *Ordnungsgewalt der deutschen Parlamente*; and Hatschek, *Parlamentsrecht*, and *Deutsches und Preussisches Staatsrecht* (1928), I, pp. 1–30. Cf. Pierre, op. cit., I, 1 ff. Cf. also the Constitution of the United States, Art. I, Sect. 5: 'Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two-thirds, expel a member.' Cf. Hinds, *Precedents*, is the great authority: 8 vols., 1907 (Washington).

7. The system of government by parliamentary discussion and decision is accepted as proper and incontrovertible.

We shall observe the various institutions which have grown up piecemeal or have been specially designed to give effect to these considerations. Before we proceed, this should be observed: these rules are in the hands of the majority; it depends upon the majority how far it shall check itself. It is obvious that the use of this power depends on the general sense of justice existent in the majority and in society at large, and, of course, how far they are aware of the nature of the task to be performed. Upon the decision depends, in part, the general repute of parliament, and the extent to which people come to believe that one assembly ought to be checked by another, whether parliamentary or extra-parliamentary. Thus the House of Lords has been defended because there is insufficient deliberation in the House of Commons; the American Senate is defended as the only place in which a minority can speak without restriction; the Senate of France and the *Conseil d'État* are supported because of the tumultuous proceedings of the Chamber; the German Reichsrat has had its power enhanced since 1919 owing to the chronic debility of the Reichstag.

THE PRESIDING OFFICER

Essential to the operation of all the rules is an officer to preside, interpret, and put them into effect. There are many qualities necessary to a presiding officer; for instance, qualities of tact and sufficient alertness during hours of speeches to detect and stop any disorder. The prime qualities are decision and impartiality. The need for a knowledge of the rules is obvious. Impartiality rests upon less obvious bases, since we find parliaments where it is almost a rule that the presiding officer shall not be impartial. Partiality results in waste of time by the challenge of the Chairman's ruling; and what is much worse, the claim which arises after the passage of the law, that it was unfairly passed. Laws made under such conditions lose part of their authority. To these effects of partiality must be added the tumult which comes from enraged spirits, or resignation to a condition of apathy.

The English Parliament has contrived to establish the conditions of impartiality better than any other parliament.[1]

By convention the Speaker is elected by the House for the duration

[1] Cf. May, op. cit., *passim*; Redlich, op. cit., II, 131 ff.; Macdonagh, *The Speaker of the House* (1914); cf. also *Diary of John Evelyn Dennison*; Ullswater, *A Speaker's Commentaries*, and Gooch, *Life of Lord Courtney*. Such biographies as Disraeli's, Gladstone's, Harcourt's and Campbell-Bannerman's must be consulted for ministerial attitude to the Speakership.

of a Parliament, and once elected he will be re-elected as often as he cares to stand, without competition. This provides both continuity of practice, the authority of permanence, and the minimum of controversy. Although the House is at liberty to propose several candidates for the Chair, the Party leaders and Whips attempt to arrange for no competition and unanimous election, and this has usually been achieved by the forbearance of the Opposition and the care of the majority not to propose a virulent partisan. The power of Speakership issues from tradition, ceremony, and the possession of present-day rights by practice, rule and statute. The office is of unbroken continuity since the fourteenth century and is actually connected with the great creative events of national and parliamentary history. The elaborate ritual of bowing to the Chair and manipulating the Mace adds to this as a factor striking reverence and awe into the breast of the average member of parliament, causing him, as he approaches, to feel, as some one has recorded, like a schoolboy. Moreover, the Speaker enjoys high State precedence : Silk-stockinged, gowned and wigged, and frequently selected with an eye to his own physical impressiveness, he himself renders obeisance to the *Chair* at the opening of every sitting of the House. For centuries the Speaker has been denied the right to speak and vote in the proceedings of the House ; a casting vote he has, but its occasion is necessarily rare, and practice has defined the use of the casting vote to be no change of the existing situation. It is the convention that he shall cease to have connexion with political parties or membership of a political club. His constituency is not contested. He is thus insulated from politics, and this is, indeed, the condition which underlies his usefulness to the House and his authority over it, which are intimately related. The Speaker's dignity is supported by a large salary, an official palace, and, unless he objects, a peerage on retirement. The Speaker presides over the House, applies the rules of debate, and settles questions of order. He is, as near as can be in a human being, the Rules and Practice of the House come to life without interposition of his own view. He regulates the order of speech, puts the question, and announces the House's decisions. He revises notices of motion and questions. He is the safeguard of private members against the abuse of the powers of the leaders in Government and Opposition, and is their mentor in procedural difficulties. Most important is the understanding that if in giving a ruling the Speaker chooses to insist, the ruling prevails in the situation, although the ruling may be challenged in a vote of censure later.

His other functions in regard to closure, the selection of amendments, and the certification of Money Bills are dealt with in other places. It must be observed here, however, that the order of debate and these other functions impose an enormous burden upon the Speaker,

one which, even with the aid of his Counsel and Clerks, becomes increasingly harassing, with the impassioning of class conflicts and the break-up of ancient parties and traditions. No Speaker can offer more impartiality to the House than the House allows. The Speaker possesses strong punitive powers, but their exercise is less desirable than self-control. Until the last two decades, with the exception of the instructive era of Irish irreconcilability, the composition of the assembly, and its own social affiliations, promoted the acceptance of certain common conventions, and therefore imposed no strain upon the opposing parties. The assembly wanted an impartial Speaker. If party warfare is sharpened, neutrals may come under fire, although their neutrality is exercised for a benefit wider than that of party. There are already signs of danger: but so far the system holds, and the institution serves to soothe asperities.

All other countries lack one or all of the qualities of the English Speakership.

The Speaker of the American House of Representatives. The chief quality of the Speaker of the House of Commons is his impartiality; he is a moderator only, and this position of balance is buttressed by certain usages. In the House of Representatives of the U.S.A. the Speakership, although originating in the conventions of the British eighteenth-century Speaker,[1] is an entirely different institution. Whereas the Speaker of the House of Commons simply utters the rules of the House, whether they are to the advantage or disadvantage of minority or majority, the Speaker of the House of Representatives has often *made* the rules of his House, by wide discretion in interpretation or the appointment of committees with power over the procedure of the House. Some of the customary powers of the Government in England are usually exercised by the American Speaker. In the U.S.A. the Speaker is not impartial and is not intended to be by the majority,[2] nor, if we judge by experience, does he intend to be, although he is expected to be fair to the minority. He is to-day one of the majority party leaders; before 1911 he was *the* party leader in the legislative branch of government, and not

[1] Cf. Follett, *The Speaker of the House of Representatives* (1896), Chap. I, and Hinds, *Am. Pol. Sc. Review*, III, 116 ff., *The Speaker of the House of Representatives*, and Chiu, *The Speaker of the House of Representatives since* 1896 (1928).

[2] Cf. resolution of thanks to Speaker Henderson: 'The position of the Speaker of the House is both judicial and political. It is judicial in this, that the occupant of the Chair is at all times bound by and obedient to a code of rules prescribed for the government and control of the House, and in the execution of which he is but its organ and servant. It is at the same time political. In the very nature of the things, he is expected in his position to look carefully to the interest of his party, and while he is to administer the affairs of his great office in a manner to best promote the public weal, it is not expected that he will fail to use all legitimate and proper methods to build up his party and fortify it against attack. . . .' (*Cong. Record*, 56th Cong., 2nd Sess., p. 3604).

seldom a rival for political pre-eminence of the President of the U.S.A.

The Speakership is established in the Constitution,[1] where it is provided that 'the House of Representatives shall choose their Speaker'. In fact he is chosen in the caucus of the majority party and then the House proceeds to his election. No minority party when it becomes a majority will, as in Great Britain, take over a Speaker previously selected by the former majority. Within the caucus the fight rages between various sections of the party for this great tactical position of leadership and control. When the Speaker is chosen he does not cut off connexions with his party—on the contrary, they are even more sedulously cultivated; he occasionally promotes bills of great and sometimes of general importance[2]; he speaks in debate although the written rules of the House deprecate this[3]; he votes, although the rules of the House do not encourage him to vote except in certain circumstances[4]; his seat is contested, and therefore he must nurse his constituency by titbits from the 'pork barrel' and by declarations of policy, and he must, frequently, harbour a certain resentment against his opponents. He promotes by positive strategy and intervention a legislative and executive policy.[5] Thus the Speaker of the House of Representatives is the avowed agent of the majority, he is involved, often he leads, in the party counsels; before 1911 he was the supreme party leader. In entering into the analysis of these functions we concern ourselves, also, with the general arrangements for governing the work and time of the House.

The House of Representatives is specially obliged to make internal arrangements for the conduct of its proceedings because (*a*) it has a large membership, the individuals of which hunger for a part of its time, especially, too, since bills of a private character are promoted in exceptionally large numbers, (*b*) the total amount of business is

[1] Art. I, Sect. 2.

[2] Cf. Chiu, op. cit., pp. 39, 42.

[3] Cf. Jefferson's *Manual*, xvii; Chiu, op. cit., p. 44.

[4] Rule I, 6. Cf. Chiu, op. cit., p. 49.

[5] Cf. *Cong. Rec.*, 62nd Cong., 1st Sess., p. 7. Address of Champ Clark, Speaker Elect: 'After sixteen years of exclusion from power in the House and fourteen years of exclusion from power in every department of government, we (the Democrats) are restored to power in the House of Representatives and in that alone. We are this day put upon trial, and the duty devolves upon us to demonstrate, not so much by fine phrases as by good works, that we are worthy of the confidence imposed in us by the voters of the land, and that we are also worthy of their wider confidence.' Then follows a list of promises made: (1) Downward revision of the tariff; (2) Election of Senators by popular vote; (3) Improvement of rules of the House; (4) Public Economy; (5) Publication of campaign contributions and disbursements before the election; (6) Admission of Arizona and New Mexico as States. 'We are not only going to accomplish them, we have already begun the great task. What we have done is only an earnest of what we will do. . . .' Cf. also *Cong. Record*, 69th Cong., Special Sess., 1st Sess, p. 379 ff. Debate on election of Speaker Longworth.

large,[1] (c) the Executive, under the rule of the separation of powers, does not lead the assembly, as in the Cabinet system. But why should the power of leadership and discipline have found its way to the Speakership? For three main reasons: first, the spirit of majority rule is exceptionally strong in the U.S.A., and that produced the disposition to vest very great power in some one; secondly, power tends to go first of all to the person in a conspicuous position with an already acquired prestige; thirdly, the separation of power between legislature and executive sometimes requires the bridging of the gap by personal arrangement between the formal spokesman of the House, namely, the Speaker, and the President (when they are both of the same party), and sometimes produces a contest between the Speaker on behalf of the majority party in the House and a President who happens to have been put in power by the party which is in a minority in the House.[2] From the beginning of the Republic these tendencies were at work, and when after the Civil War the economic and social development of the country began to force a mass of new work upon political institutions, the parties were compelled to promise much, and, in order to keep their promises, to submit themselves to a systematic and rigid discipline, this involved both Congress and the Executive. A combination of personal character as embodied in

[1] The following table (given in Chiu, op. cit., p. 115) shows the total numbers of bills and resolutions introduced into the House, reported from the committees and enacted into laws since the Fifty-fifth Congress. The large proportion of private laws is indicated by the figures in column 4.

Congress	Number of Bills and Resolutions Introduced	Number of Reports	Public Laws and Resolutions	Private Laws and Resolutions	Total Laws and Resolutions
55 . . .	12,223	2,364	429	1,044	1,473
56 . . .	14,339	3,006	443	1,498	1,941
57 . . .	17,560	3,919	470	2,311	2,871
58 . . .	19,209	4,904	574	3,467	4,041
59 . . .	25,897	8,174	692	6,248	6,940
60 . . .	28,440	2,300	350	234	584
61 . . .	33,015	2,302	525	285	810
62 . . .	28,870	1,628	530	186	716
63 . . .	21,616	1,513	417	283	700
64 . . .	21,104	1,637	458	226	684
65 . . .	16,239	1,187	404	104	508
66 . . .	16,170	1,420	470	124	594
67 . . .	14,475	1,763	655	276	931
68 . . .	12,474	1,652	707	289	996
69 . . .	17,415	2,319	808	537	1,423

[2] Cf. Brown, op. cit., p. 52: 'Perceiving a possible danger to the security and stability of legislative government, the House of Representatives, the body peculiarly the bulwark of popular liberty, put itself in a posture of defense to meet its two deadliest enemies, fortifying itself on the one hand against the possible encroachment of the Executive, from an instinctive fear of despotism, and on the other against forces within its own membership likely under exceptional circumstances to seek the destruction of the party system for the sake of immediate selfish interest, as a thoughtless boy might fell a splendid tree to obtain a kite caught in its branches.'

Speakers like Blaine,[1] Randall, Reed,[2] and Cannon,[3] who were forceful and capable leaders of their parties, with the novelty of the problem of positive governmental leadership, gave the power, with remarkable absoluteness, to the Speaker,[4] and there it remained until, by 1911, it dawned upon Congressmen that, after all, this was not the only possible way of providing for the leadership that was needed; that there were alternatives; and that such alternatives might open the way for a share in the power by those who dissented from the policy of the party leaders. Moreover, a new generation, especially from the West and Middle West, were insurgent against the 'old gang', who had made the rules to suit themselves. Hence the revolt of 1911, and a slight decentralization of the Speaker's power. Several questions require discussion: first, the formal sources of the Speaker's power before 1911; second, the formal changes made in the revolt of 1911; third, the practical results of the revolt.

The Speaker's strength issued from his right to the exercise of three main powers: the appointment of Committees, the Chairmanship, *ex officio*, of the Committee on Rules, and the 'recognition' of a member to address the House.

The appointment of Committees was a tremendous source of strength because in the American Congressional system, as we show later, no bill is considered by the House unless first reported by a Committee, and these Committees have authority not only over the bill in all its essence and parts, but also (in practice) whether it shall ever arrive before the House at all. Hence, the power to appoint Committees was a plenary power to determine policy; and though certain rules, like that of seniority and geographical distribution, were conventional restraints upon the discretion of the Speaker, they could still be overcome by determined Speakers, and they were. If the Committees had such power, not only over bills of general importance, and of appropriations and taxes, but those of a private

[1] Cf. Ridpath, *Life and Work of James G. Blaine*; Blaine, *Twenty Years in Congress* (1884–6). [2] Cf. McCall, *Life of Thomas Brackett Reed* (1914).

[3] Cf. Busbey, *Uncle Joe Cannon. The Reminiscences of a Pioneer American* (1927). Sidelights on Cannon's powers are to be found in Stephenson's *Aldrich*.

[4] Cf. Cannon, cited in McClellan, *Leadership of the House of Representatives*, p. 595: 'Yes, I know I am a Czar in Democratic platforms, but only just so long as I have a majority behind me who like a Czar. There has been much said about Tom Reed and his rules, and he was the first Czar. Tom Reed led, but he would have stood naked before the minority if he hadn't been clothed with a majority. That is what makes a Czar in this House, a majority, and it makes no difference whether it is on the Republican or Democratic side'; and Hart, *Practical Essays in American Government* (1893), p. 19: 'The powers now exercised by the Speaker will probably be exercised by each succeeding Speaker and will somewhat increase. Since the legislative department in every Republic constantly tends to gain ground at the expense of the executive, the Speaker is likely to become, and perhaps is already, more powerful, both for good and for evil, than the President of the United States. He is Premier in legislation; it is the business of his party that he be also Premier in character, in ability, in leadership, and in statesmanship.'

and local nature, giving benefit to particular districts, then they were obviously the key positions for political influence. The Speaker therefore had the distribution both of political prestige, which gave the holder thereof a claim in party councils, and in the patronage which fell to the party under the 'spoils' system, and, also, the wherewithal to please and attach his constituency, territorial or group, to himself. This was a formidable power: the Speaker could decide the career of Congressmen. Hence their humility and subservience, which again added to his power; hence also their readiness to revolt as soon as cleavage within the party should offer the prospect of throwing off the yoke. Especially bitter were the personal controversies relating to chairmanships of the Committees. The Speaker ruled in the name of the party,[1] he ruled, however, with the co-operation not of the whole party, but with a half-dozen principal henchmen. The House was guided and controlled in its debates, its legislative output and its executive investigations, by the Speaker and the chairmen of the half-dozen principal Committees.

Nor was that all. Among the Committees of the House was and is the Committee on Rules. This was first appointed in 1858 to revise the rules of the House and report the revision to the House.[2] The Committee, in 1880, became permanent. The pressure of business and the constituencies upon the House increased; new powers, calculated to help the House to cut through the thick jungle of legislative proposals, were given to the Committee. It acquired the power to make a way in the business of the House for the consideration of any bills. This was done by giving the Rules Committee the right to report *at any time* [3] that the rules should be changed, and the change of rules permitted a Committee to report its proposal at the time stated by the Committee. True it was, that a majority of the House had to accept this report—but whenever has a majority party refused to follow its leaders? Dilatory tactics against the Committee were swept away by the Speaker's ruling,[4] and the Committee was allowed to report without previous notice.[5] These 'special orders' were thus used to give priority to legislation which the Committee and the Speaker believed to be entitled to it.[6] They are somewhat equivalent

[1] Cf. Brown, op. cit., p. 160: '"The appointment of the committees," said the Speaker, "is made by the Speaker under the rules, unless the House should otherwise specially order. The Speaker of the House in the exercise of that function is responsible to the House and to the country, this being a government through parties and the Republican party has placed power in the Speaker as to the appointment of committees."'

[2] Cf. Hinds, *Precedents*, Vol. IV, Sect. 4321; Alexander, *History of the Procedure of the House of Representatives*.

[3] Cf. Follett, op. cit., p. 275; Alexander, op. cit.; McCall, *The Business of Congress*.

[4] Hinds, Vol. V, Sect. 5739. [5] Follett, op. cit., p. 276.

[6] Cf. *Cong. Rec.*, 60th Cong., 2nd Sess., pp. 588, 589: Hinds (clerk at the Speaker's

to the power of the Cabinet in the English House of Commons in asking for, and obtaining, by majority vote, the settlement of the time-table of the House. Before 1911, the Speaker was chairman of the Committee on Rules, and he appointed its two majority members. The two minority members received scant grace. Thus the triumvirate ruled the House; and of the three the Speaker was first and all.[1] He benefited from the admitted need to disentangle the thousands of threads of Congressional business and give preference to the business which the party leaders, whether in the Congress or in the Presidency, considered indispensable. What the Speaker decided in Committee, the Speaker would facilitate from the Chair.

Yet in order to overcome obstruction, the right to 'recognize' a member needed to be vested in the Speaker. This was done by a succession of developments which led to a singular absoluteness of his power. No one could address the House unless by previous arrangement with the Speaker.

'Whoever failed to catch the Speaker's eye might twiddle his thumbs until the end of the session. Until the Speaker chose to recognize him he was impotent, and could obtain no consideration for the measures in which his constituents were interested. The power of recognition sent to the Speaker's anteroom, before the House convened each day, humbly, and with hat in hand, every member who desired recognition on the floor for consideration of a bill or resolution. . . . Under this system the Speaker's two lieutenants, supported by the other leading men of the organization, controlled every avenue to preferment through the federal purse, every dollar a member might hope to see expended for an improvement in his district, a new post office, a customs house, a river or harbour development, the dredging of a creek or the construction of a bridge, and every duty he might desire to see levied in a tariff bill for the support or encouragement of an industry in which his constituents were interested, and upon the securing of which his very political life must depend.'[2]

table) on *Order of Business in the House*: 'The necessary use of the special order was continued until 1890, when for the first time the flexible and efficient order of business now in vogue was put in operation. This new rule for the order of business would have been sufficient at that time to do away with the use of the special orders from the Committee on rules had it not been that the habit of obstruction was rife in the House and the special order continued in use as a means of thwarting that obstruction by providing a fixed method of consideration upon a particular bill and by shutting out dilatory and obstructive motions. The use of the special order has continued, although it has not been so much used in later years, and business has proceeded more according to the regular order. The function of the Committee on Rules is remedial. Most of the bills which it assists might be passed in another way. To use a commonplace illustration, the Committee on Rules, by the special order, takes a bill up on the elevator instead of requiring it to be carried up by the stairs. But in every case a special order is of no effect until agreed to by majority vote of the House.'

[1] *Cong. Rec.*, 56th Cong., 1st Sess., p. 7: 'To say that the Committee can be controlled by the majority is not candid, because the Committee is considered the Speaker's official family, and no gentleman of the Speaker's party would serve upon it unless he could support the Speaker's policy.'

[2] Brown, pp. 86, 87.

This system was attacked and, formally, destroyed in a campaign which began in March, 1910.[1] Two vigorous tendencies sought their outlet, the Republican 'insurgent' movement invigorated by the political forces in the Western States, and the individual dissatisfaction of Congressmen, ostensibly, with the injustice done to their constituencies by an unrepresentative system. The result was the establishment of certain new rules: (*a*) to make the Committee on Rules elective by the House and of an increased size and depriving the Speaker of the right to a place upon it; (*b*) to make the Committees of the House no longer selective by the Speaker, but by a Committee on Committees (this is the Ways and Means Committee of the House), and (*c*) establishing by the Rules of the House definite times for certain business which the Speaker must respect—such as Calendar Wednesday, and the Discharge Calendar.

What have been the results of this evolution upon the Speakership? He still remains in intention and practice a party man. He is still one of the very small knot of Congressional leaders who treat with the President for passage of 'administration' measures. He is still consulted by, and has great sway with, his party 'Steering' Committee and the Floor Leader of the majority party. He is still a major factor in deciding assignments to Committees and the priority of business, because he is one of the most eminent, usually the most eminent, of his party: that, indeed, is why he was elected Speaker. Order and system in a House of 435 members there is bound to be, and the power of leadership must somewhere be lodged. While, until 1910, it was concentrated in the Speaker and his friends by grace, it is now concentrated in the Speaker's friends and the Speaker. Leadership has been 'syndicated' or put into 'commission', but the Speaker is still the predominant member of the syndicate.

France and Germany. The Presidents of the Chamber of Deputies and the Reichstag are, of course, like the British Speaker, and unlike the American Speaker, the products of a parliamentary

[1] Cf. Chiu, op. cit.; Atkinson and Beard, *Am. Pol. Sc. Quarterly*, XXVI (1911), 381–414, *Syndication of the Speakership*; Brown, op. cit., Chap. X ff. Cf. p. 159 (Speech of Nelson, of Wisconsin): '. . . We are fighting for the right of free, fair and full representation in this body for our respective constituencies. The so-called insurgent Republican represents as good citizenship as the regular does. The 200,000 or more citizens of the second district of Wisconsin have some rights of representation here under our Constitution. But what is that right under the despotic rules of this body? Merely the privilege to approve the will of a Representative from another state invested with despotic power under artificial, unfair, and self-made rules of procedure.

'We know, indeed, by bitter experience what representation means under these rules. It means that we must stand by the Speaker, right or wrong, or suffer the fate that we have endured. Let no one accuse us, therefore, of an alliance with Democracy for unworthy purposes. We are fighting with our Democratic brethren for the common right of equal representation in this House, and for the right of way of progressive legislation in Congress; and we are going to fight on at any cost until those inestimable rights have been redeemed for the people.'

system in which the guiding and controlling authority is a responsible ministry. The Presidents have little extraneous cause, therefore, to become partisans. Yet the conditions of effective technical excellence or impartiality are not present in the same measure as in England. In France [1] the President of the Chamber is elected anew at every *session*. This is part of the tradition of distrust against constituted authorities. It is a grave fault from the standpoint of legislative efficiency, as with each contest in every session there is a stirring of all the passions of party, and objections are urged to the incumbent as well as his merits. Nor is there sufficient time for the President to dominate his electors: the sense of his recent arrival is always there, and he cannot acquire the aspect of doom which permanence gives. Whereas, since 1875, the House of Commons has had six Speakers, France has had thirteen, and between them Paul Deschanel and Henri Brisson held office for one-third of the time, the latter, very intermittently. The uncertainty of election produced by the large number of Groups is also a factor which prevents the President from towering above them all, especially since the need for an absolute majority produces the second ballot system. Nor is that all. The Presidents of the Chamber and of the Senate have become part of the regular machinery of State with the President of the Republic in the formation of Ministries. They are in politics: they are elevated to the Chair less for their technical competence than for their political attitude, though suavity and an impressive appearance are recommendations. They are opposed in their constituencies. They remain attached to their parties (though not in sittings of the Chambers), co-operate at Group meetings, sometimes enter into Press controversies. They pass into Ministries, then back into the Chair [2]; and, although they do not intervene, as partisans in debate, their frequent hortatory remarks are necessarily biased, and provoke partisan passions. In July 1926, there occurred an incident in the Chamber of Deputies, unthinkable in England. M. Herriot, then President of the Chamber, suddenly determined to prevent the Government from obtaining powers of legislation by decree. Without notice he quietly and suddenly appeared in his seat in the Chamber, and his speech overturned the Briand Government. Hereupon he was called by the President of the Republic to form a new Ministry.[3] The Presidency of the Chambers is a stepping-stone to Presidency of the Republic.[4]

[1] Cf. Pierre, I, II and III, paras. 407 ff., and sections on his various attributes: Ripert, *La Présidence des Assemblées Politiques* (1908): for history and evaluation.

[2] For example, Paul Deschanel, Charles Dupuy, Casimir Perier, Henri Brisson, Leon Bourgeois, Painlevé.

[3] Cf. for an account of this incident Suarez, *De Poincaré à Poincaré* (1928), p. 138 ff.

[4] For example, Deschanel, Casimir Perier (Bourgeois and Painlevé were spoken of), and Doumer (1931).

The Presidents of the French Chambers have powers in regard to the regulation of business similar to those possessed by the English Speaker, though perhaps more complicated by virtue of the many Groups, the Parliamentary Commissions, and participation in the Council which settles the order of business. It is somewhat simplified by the fact that the order of speech is settled by the rules. The task, moreover, is made very difficult by the tradition of the office, its connexion with politics, but most of all with the restiveness of the Chamber. Calls to order are unheeded, or are challenged with invective. The House may, and often does, reverse by its vote a ruling of its President. Irrelevance when reprimanded turns sour and becomes sarcastic expostulation. Suspensions of the House for a quarter-hour are frequent to quieten the irate. At the root of all this is the notion of the deputy's individual sovereignty, the petulant party divisions, and the lack of a sense of State.

The President of the Reichstag [1] is, since 1919, elected for a Parliament (before that, election was sessional); and practice has given the Presidency to the largest party, although, of course, election is by absolute majority.[2] The practice was adopted although it was urged in the Committee on the Rules of Procedure that this might exclude the best qualified in the Reichstag from the Chair.[3] For this the largest party has to concede certain committee chairmanships and other government advantages. Since 1920 Paul Löbe has continuously occupied the Chair. However, the ascension to the Chair is not marked by the quiet and decorum observed in England because, before the War, the Socialists were on the offensive, and since then the party struggle has been intensely bitter. Earlier practice excluded the President from his parliamentary Group, but the Reichstag Committee on Rules decided not to say anything in the Rules on the subject. In fact he has remained closely concerned with Party affairs, speaks at meetings, and writes in the Press. With much the same duties and powers as occupants of the Chair in other parliaments, the Reichstag's President may in a difficult situation either proceed with his own ruling or put the difficulty for solution to the House, or he may place the matter before the Council of Elders (*Ältestenrat*) for decision, this being the most usual procedure adopted by him, or by the Reichstag when something goes amiss. Like other Speakers, he has a great ceremonial position, but as in France, though not with the same ungovernability, the intensity of party passion, produced by religious, economic and cultural differences, imposes a heavy strain upon his effectiveness and impartiality.

[1] Cf. Hatschek, *Parlamentsrecht*, 169 ff.
[2] Cf. *Geschäftsordnung*, Art. 9 ff.
[3] Cf. *Bericht*, p. 20.

DISCUSSION

We have no means of knowing the inward history of the establishment of the number of readings of a bill in its progress towards law, because English practice, which has been of such influence upon other countries, began at a remote and unreported time. We can only guess at the motives from the remarks of commentators, who rationalized the processes at whose birth they were not present.[1] Three readings of a bill have become an unquestioned dogma in England, though, of course, to-day the dogma is hollow, and practice is far different from anything that the term suggests. But the notion of three readings was carried into the U.S.A. through the early legislative assemblies in the Colonies, and Thomas Jefferson's *Manual of Procedure*,[2] and into France and Germany by the influence of Bentham, in whose *Political Tactics* the process was rationalized thus:

'The advantages of these reiterated debates are—(1) Maturity in the deliberations, arising from the opportunities given to a great number of persons, of speaking upon different days, after they have profited by the information which discussion has elicited; (2) Opportunity afforded to the public, to make itself heard—and to the members, to consult enlightened persons out of doors; (3) Prevention of the effects of eloquence, by which an orator might obtain votes upon a sudden impulse; (4) Protection to the minority of the assembly, by securing to it different periods at which to state its opinions; (5) Opportunity for members absent during the first debate, to attend when they perceive that their presence may influence the fate of the bill.

'Every one knows by experience, that the strongest reasons alleged by two parties cannot be estimated at their true value the first time of hearing: they make either too much or too little impression;—too much, if they are developed with all the seduction of authority and eloquence—too little, if they are opposed by violent passions, interests or prejudices. After an interval of a few days, the mind becomes calm—public opinion has time to act—the effect of mere eloquence ceases to operate—reason resumes its sway. Very different views are often brought to the second debate, from those which were successful on the first,—and the two parties approach each other with arguments matured by reflection and communication with the public.

'Parties appear to have a necessary existence. If a single debate decide the adoption of a law, each party has an extreme interest in employing all its means to secure the victory of the day—and great heat and animosity are produced by the debate. But when it is known that a first victory is not sufficient—that the struggle must be renewed a second and a third time with the same antagonists,—strength is reserved—it is tempered, that it may not injure the cause in which it is employed; no one dares to take an unlawful advantage, because this would be to supply arms to his adversaries;—and the party in the minority, which gradually sees that its ultimate defeat approaches, gives way to it with the more moderation, inasmuch as it has been allowed every opportunity of preventing it.'[3]

[1] Cf. Sir Thomas Smith, lib. II, cap. III, pp. 169–81: 'All bills be thrice, in three divers days, read and disputed upon before they come to the question. . . .' Cf. Blackstone, *Commentaries*, Bk. I, Chap. II; Redlich, I, 6 ff.

[2] This is still a part of the rules of procedure of the House of Representatives and the official edition of these rules begins with the manual.

[3] Bentham, *Political Tactics*, Chap. XI, Sect. 3, '*Of Three debates upon every proposed Law*'.

No longer Three Readings. No constitution can escape the moulding effect of the necessities of character and environment, and to-day in England the three readings are not what they seem, while on the Continent, and in America, vital differences from the English system have been instituted. The great changes which have occurred in English practice are the change in the public significance of the First Reading, the increased importance of Committee discussion, the reduction in the seriousness of the Third Reading.

On the Continent and in America a system of deliberation has been developed, the features of which are direct contradictions of all for which English parliamentarians seem to strive. For, in England, in spite of the increasing importance of committees in parliamentary procedure, the theory is still maintained that the House itself, as a whole, is sovereign over the principle and the major applications of a bill. The Continent and America have abandoned this system: and their Committees are made, if not the ultimate, then the principal masters of the bill. Regard, for example, the great treatise on French Parliamentary Law, that of Pierre; the Parliamentary Commissions must be treated of first, for they are so much the masters of the Chambers, and have rights of intervention and decision to such a degree, that if their composition and functions are not well grasped, the whole meaning of procedure in the Chamber is misunderstood.

We may briefly say at once, and the demonstration will follow later, that in America and on the Continent the proceedings of the full Assembly are mainly (not wholly) directed to impressing the public, while the real work is done in the Commissions; and England slowly approaches that condition of affairs, in spite of frantic attempts to maintain the belief that the House is still an effective place of thought, deliberation and decision. For, hard and unchallengeable in their power, the dictates of the Party System have impatiently torn from parliament, as a body of individual members, the power of government, and have firmly vested it in the leaders of the major parties. Of the full Assembly a kind of essential committee has been formed, consisting of the leaders of the government and the opposition, and these, with their immediate confidants and officers, and others drawn from time to time as required from the body outside to help them in special matters, draft bills, lay down the limits of discussion, bargain for compromises, and fix the date and time of a vote. In England the Standing Committees are supposed only to edit the bill and the amendments resulting from this process, they are supposed to be non-contentious: in fact, their work is taking them more and more into the fields of the struggle for power. Elsewhere the Parliamentary Committees or Commissions share the power of decision with the little knot of party leaders. Mindful of these general conditions we can approach the stages of parliamentary deliberation.

In England the First Reading is almost entirely a formal and non-deliberative stage. A bill may be introduced either by its simple presentation at the table [1]; or with a brief explanatory statement from the member who moves the motion for leave to bring in the bill.[2] In the first case, the First Reading has taken place without any debate at all, and perhaps without members knowing that a bill has been introduced. In the second case a brief explanatory statement is allowed to the mover and the member who opposes introduction; and the rule has come to be called the Ten Minutes Rule. The Ten Minutes Rule is usually employed for government bills where a deliberate public announcement is deemed necessary; as in the Education Bill of 1917. Simple presentation is adopted by private members who wish to impress their constituents with their creativeness, and know very well that their chances of getting a bill made into law are as remote as the moon. It is also adopted by the government. This undebated introductory stage is purely one of preliminary formal advertisement that the subject is about to be treated by Parliament. For the first time a formal draft is presented of the detailed form in which principles discussed at previous elections are to be made law, or, sometimes, never discussed before.[3] It is a notice of intention not only to Parliament, but to the Press, the Party caucuses and the organized interests. While it is the beginning of one process, it is the end of another: for from the moment that legislation became possible, and the draft was in preparation, the most important interests scanned the Press for signs of its progress, and exerted every means to influence its shape. So also did the department responsible for composing the bill call in to its aid experts and representatives of interests. Kites were also flown in order to give the government the opportunity of discovering its strength or weakness.

A day is fixed for the Second Reading by the member proposing the bill. In England no difference is made, formally, between a private member and a member of the government for this arrangement, but practically there is all the difference in the world, for the

[1] S.O. 31 (2); cf. May, p. 385.

[2] S.O. 11. Cf. May, p. 380: 'When an important measure is offered by a minister or other member, this opportunity is frequently taken for a full exposition of its character and objects; but otherwise debate should be avoided at this stage, unless it be expected that the motion will be negatived, and that no future occasion will arise for discussion.' (The lengthened debate on this question is of comparatively recent origin, . . . e.g. Protection of Life and Property (Ireland) Bill . . . five sittings, 24th Jan.–2nd Feb. 1881 . . .; Government of Ireland Bill, 1886, . . . 1893; . . . Criminal Law Procedure (Ireland), 1887. Cf. footnote 5, p. 380.) Cf. also Campion, *Introduction to the Procedure of the House of Commons*, p. 136.

[3] Though, indeed, the bill may be merely presented in 'dummy', that is, there is the title, and a bare explanation of the objects of the bill, without argument.

government commands the time of the House,[1] and fixes the day, usually after conversation through its Whips with the opposition. The rules of the House do not provide for an interval between the First Reading and the Second. In olden times, the rule was on 'divers days'; undoubtedly as a safeguard against surprise and inconsiderateness. This is hardly necessary in England where fairly strong principles of fairness are shared by all parties and the electorate, and in fact plenty of notice is given to the opposition. Jefferson's *Manual* provides that the Second Reading must regularly be on another day.[2] On the Continent there are regular, but short, intervals.[3] The Second Reading is not the time for detailed amendments or for any discussion and vote upon the clauses. It corresponds almost exactly to the Continental practice of '*discussion générale*', which usually precedes passage to the particular articles. The supporters of the bill argue why in general such a bill, and even this particular bill, is necessary; not to insist that every clause is either perfectly adapted to its purpose, or that every purpose is incontestably good. It is true, indeed, that ministers would and do speak in this sense; but more out of the tactics of bargaining than out of an unqualified belief in their charge. The opposition, on the other hand, move formally that the bill be put off to some impossible time,[4] or that for various reasons it ought to be rejected. Its attack is to show that the details of the bill do not carry out its main intention, and that the intention itself is unjust, or inexpedient.

[1] TABLE: PUBLIC BILLS

	Session 1927	Session 1928–9
Bills which received the Royal Assent —		
(i) Government	36	33
(ii) Other	10	9
(iii) Provisional Order and Confirmation	45	22
Total	91	64
Bills introduced but not passed—		
(i) Government	4	1
(ii) Other	93	39
(iii) Provisional Order	—	7
Total	97	47

In the session 1927, of the bills which received the Royal Assent, eight were brought from the House of Lords. In the session 1928–9, nine were brought from the House of Lords. (Cf. *Return of Public Bills*, etc., *Parl. Papers*, 1927, 0.001, and 1928-29, 0.003.)

Note also: session 1927, the forty-six Government and other Bills which received the Royal Assent received a purely formal First Reading (cf. *Hansard*). In the session 1928–9, two bills (Private Members) were introduced under the Ten Minutes Rule (S.O. 11), the remaining Government and other Bills were introduced without discussion.

[2] p. 156, Section XXV. [3] Thus Germany and France.

[4] S.O. No. 31 A. This locution is thus reasoned (May, p. 359): (*a*) Such a form of amendment is *more courteous* than a point-blank rejection; (*b*) a mere negative would not prevent the repetition of a bill on any subsequent day.

The words of Erskine May are carefully selected, but still convey a slightly erroneous impression. He says that 'The second reading is the most important stage through which the bill is required to pass; for its whole principle is then at issue, and is affirmed or denied by a vote of the House'. Now this may have been true of the House up to 1870, but it became less and less true from that time. It cannot be gainsaid that any other stage in the full assembly is less important; it cannot be denied that the House divides. It is true that Members (the few who are interested and instructed in the matter of any particular bill) fervently applaud or denounce the bill; but we must not forget the saying which is proverbial in all parliaments, 'I have heard speeches which have profoundly moved members; but none which has even turned a single vote.' *The principle has been affirmed or rejected in the electoral process which put some men in a majority and others in a minority.* Neither does the opinion of the great Clerk of Parliament adequately include a consideration of the part played by the Committees of the House. Decisions are made there: but not in the Second Reading; though it is true that argument during the Second Reading may influence the Government and cause it to make promises of amendment.[1] What is more, the organs of opinion of party and interested groups are extremely vocal from now onwards and seek to exert influence upon the minister in charge of the bill. These obtain their opportunity for concrete amendments in the stages of cogitation which immediately precede, and operate during, consideration in Committee.

I will not at this point analyse with care the functions of the English Standing Committees, but reserve their consideration until they can be compared directly with the Continental and American Committees. Let us, however, indicate their main features. All bills, save Financial Bills, and those expressly reserved to consideration by the House in Committee of the Whole or Select Committees, go automatically to one of the five Standing Committees.[2] These Committees have wide powers. Formally,[3] indeed, they may do anything to the bill that they think fit, provided that they are relevant to its subject-matter. Actually, the House is jealous of serious amendments made in Standing Committee, and the doctrine that amendments must be non-contentious is still to be heard. This doctrine has

[1] Promises which are most frequently fulfilled by amendments introduced by the Government in Committee and when the bill goes before the House of Lords.

[2] S.O. 46. Cf. May, p. 396. The Standing Committees are distinguished by the letters A, B, C, D, the fifth being the Committee on Scottish Bills.

[3] S.O. 34 (Amendments in Committee) prescribes that: 'It shall be an instruction to all committees of the whole house to which bills may be committed, that they have power to make such amendments therein as they shall think fit, provided they be relevant to the subject-matter of the bill, but that if any such amendments shall not be within the title of the bill, they do amend the title accordingly, and do report the same especially to the House.'

a powerful effect in limiting the freedom of the Committee; and a retroactive safeguard has been sought by the House in its Report Stage. Though the members in Committee are said by some to be freer from party alignment than members in the House, they are not much, if at all, freer, since the Minister in charge exacts the support of members of his party, of whom a majority are upon the Committee. They are freer only as to details; and as these are usually insignificant the limits of freedom are narrow. Yet their work is important: for they meet under conditions of close personal contact and in a frame of mind which gives birth to rational accommodation, a mental condition expressed by the phrase 'businesslike discussion'. Members are allowed to speak more than once on the same topic.[1] The rhetorical necessities of seducing the electorate are much reduced, and the mind is more sensitive to the influence of the scientifically known quantity and quality of the social forces to be controlled by the law. The Committees are confronted by details, such as the proper space which should be allowed per person in a State-subsidized house, the conditions of sub-letting rooms in a house the rent of which is controlled by the State, safety-appliances in film-production studios, etc. These matters cannot be discussed in a large assembly because the physical conditions of debate do not admit of close argument or the effectiveness of spontaneous interjections, or written demonstrations of the truth of the argument. (Indeed, the appropriate size of an assembly depends upon the nature of the thing under discussion—and this is variable.) Figures must be looked at attentively to acquire meaning, added or deleted words need careful scrutiny before their effect becomes plain, and such attention and scrutiny are impossible in any large hall such as the House of Commons or, indeed, any of the assemblies of which we are speaking. Sir Robert Peel speaks somewhere of 'mathematical' attention to his work, when drawn up to a table, with paper and pen, his mind concentrated. That is the kind of attention which more members are able to give in Committee than in the House: for the Committee stage is a stage of *verification*, it *measures* wherever possible. Adjectives are made more precise, and their wrappings of argument are pruned of what seems to have meaning yet is not meant. The rules attempt to secure, among other things, that there shall be notice of amendments, to save obvious difficulties and inconveniences (though notice is not obligatory), and to secure that amendments shall be grammatical and intelligible. Further, the chairmen have power to select from amendments and to call upon members of such amendments to explain their objects.[2]

[1] Cf. May, p. 315.

[2] S.O. 27 A. This rule which holds good for the Committee of the whole House, the standing committee, and the report stage is known as the 'kangaroo' form of closure and its practice is discussed later.

Finally, the Committee stage saves the House of Commons a great deal of time: so much, indeed, that without the help of committees the House would be paralysed. Indeed, it was this consideration which caused their re-introduction in 1880 and their subsequent development.

The Report Stage is one through which bills amended in Committee, whether Standing or of the Whole, must pass.[1] They do so to give the House the opportunity of recasting the work of the Committee; and it is one of the external signs of the jealousy of the Whole House for its ultimate authority. Now the House has by this time discovered the detailed merits and demerits of the bill; constituents and the Press, local authorities and organized groups, have made their opinion very clear; and almost all their opinions have been embodied in amendments at the Committee stage. There is always some one in the House, however, able to think of something new if not significant. To allow a further free debate in Report Stage would result in another Second Reading of more significance, since members are now more interested. This is what actually happened when the Committee system became an important part of the regular procedure of the House. The Report Stage began to stretch out into unsuspected lengths; and the time of the House, saved in Committee, began to be lost in Report.

Therefore, in 1920,[2] it was settled that amendments on Report must be within the ground trodden by the Committee. At this stage, then, there is a clarification of doubts, of small difficulties and verbal obscurities. The Third Reading is almost purely formal: and as soon as it, also, began to show unmistakable signs of indefinite extensibility, the House decreed that no amendments, not being merely verbal, shall be made to any bill on the third reading.[3] On this occasion the various parties get a final opportunity to reiterate their general attitude to the bill; the Government, which is invariably successful, boasts that the bill was the triumph of argument and skill, and thanks its supporters and the Civil Service (which thanks its stars that the end is in sight), while the Opposition repeats its prophecies of dire consequences, its hopes that the country will truly judge the issue (that is, that it will think that the Opposition is right and the Government wrong), and that, in any case, the Government has triumphed not by argument but by the sheer force of slave-driven numbers. The bill then passes to the House of Lords.[4]

Party. It will be seen on close inspection that there are Five Stages in the normal progress of a bill. If these Five Stages were

[1] S.O. 39 ff. But if the Committee of the whole House has not amended the bill it may proceed at once to its Third Reading; whereas the bills from a Standing Committee even if not amended must pass through the Report Stage.

[2] S.O. 41. [3] S.O. 42.

[4] Cf. May, p. 384 ff. for an account of the procedure in the House of Lords.

each of adequate length there would be no question of the care with which the House discusses a bill. But we shall shortly see that in fact these stages are short, sharp and vehement; that not all clauses are discussed; that not all amendments are considered; that not all the loose ends are tied up; that not all obscurities are clarified. Disaster would entirely overcome the House if it were not for strict rules. An even worse fate would overwhelm Parliament were it not based, as it is, upon the assumption that parties are the appropriate managers of discussion, not the individual members. In fact, almost the whole process of discussion and amendment is carried through by the initiative, the expertness and the drive of one or two leading members, who are particularly expert upon the given subject, and with the aid of private experts, or members of the parties' research staff, or even specially briefed assistance. There must be a continuously attentive and expert body which assumes the responsibility of discussion; a small body which can sift from the numerous objections those which are most important and for which there is time. That small body is in all countries the Party, which, for the time being, is represented by a specially designated member from among the ranks. In England the Party operates in the House and in Committee: in France, Germany and America it operates more effectively in the Committees. Let us then turn to the procedure of these countries; sketch their general manner of handling bills, and then concentrate particularly upon Committee procedure.

France: the Power of the Commissions. Following Bentham's 'Tactics'[1] the French Constitution of 1791 required three readings with intervals of eight days between them. Under the Consulate, the Empire and the following régimes, one reading only was required; but this was in assemblies which were not sovereign, and to whom the bill was sent in its ultimate form by the *Conseil d'État*. The short-lived Second Republic, *being founded upon a single-chamber system*, provided for three readings. The first impulse of the Assembly of 1871 was to decree three readings; but *since there was a biennial system* the readings were reduced to two, with an interval of five days between the vote of each reading.[2] The President (which in practice means the Government of the day) is entitled to ask for a third reading: but this power has never been used, because quite enough time is spent upon discussion, and because the Government rarely sees the need for debate upon its proposals. Owing to the looseness of party control, discussions tend to become interminable; and the tendency, therefore, has constantly been to curtail the formal stages of debate, which would give members an opportunity to raise questions and offer objections. Indeed, as we shall later see, parlia-

[1] Cf. Ilbert, *Methods of Legislation*; and cf. Pierre, I, 971, footnote.
[2] Pierre, I, 972.

mentary self-control was so weak that financial legislation was rarely passed within the proper time, given the date of ending of the financial year, and the rules of procedure went so far as to reduce the deliberation upon money bills *to one stage*![1] The urgency of such bills dictated the discarding of the safeguard of debate; whereas in England the gravity of such bills has caused the creation of additional safeguards. But whether this itself is wise we discuss later. Further, in recent years a time-limit has been put upon speeches.

Now it has been decided[2] that normally there shall be only *one* deliberation in the Chamber—unless a member moves that there shall be a second stage, when the Chamber decides what shall be done. This would seem a strange and dangerous procedure were it not for the fact that the bill has already been thoroughly threshed out by Commissions whose report has been distributed in advance of the debate. The constitution and function of these Commissions we shall study in a moment. Let us now sketch only the general lines of procedure. The reading falls into two parts: the '*discussion générale*' and 'the *passage aux articles*'; as a rule the first precedes, but the order is sometimes reversed. Amendments may only be put, of course, in the discussion of the articles, which stage corresponds roughly to the Committee of the Whole House in England. Before the final vote is taken on the whole bill, directly after the articles have been discussed and passed, the parties are allowed a Parthian shot. This was formerly accorded to members as individuals by the rules,[3] but it is now simply an unwritten practice, and it appears that these '*considérations générales*' may be the collective declarations of groups.[4]

Amendments must be offered before the discussion commences; and they are examined by the Commission which states its attitude to them in an annexe to its report. Later amendments tabled before the discussion begins are the subject of a supplementary report. The Commission is thus the master of the bill and amendments of it; for its jurisdiction extends even into the debate. Amendment offered during debate may at the request of the president or the reporter of a commission, or a minister, be sent to the Commission for study. When the amendment is not challenged in this way the motion is put to the House: 'Shall we consider this amendment?'[5] and upon this there is a brief speech by the author, and when the Chamber has decided that it shall be taken into consideration the amendment goes to the Commission for consideration; of course, to save time, and to avoid the interruptions of debate, the Commission often deliberates

[1] Pierre, I, para. 816.
[2] *Règlement*, Chap. X, Art. 82.
[3] Pierre, I and III, para. 820.
[4] Ibid., III, 822.
[5] *Vote de prise en considération* (Pierre, III, paras. 830–8) and *Règlement*, Chap. X, Arts. 85–7.

at once in the House. The discussion is suspended only if the articles following are affected by the amendment; for then the Commission requires more deliberate study before it can give the Chamber a proper account of the effect of the amendment. Before the vote on the whole of the bill the Chamber may send it back to the Commission for revision and co-ordination. The Commission has the right to require this reference back.

This is a picture entirely different from the English. For the Commission predominates: the House cannot discuss before it reports; it selects and amends amendments; it watches the whole of the debate, guides it, intervenes as a specially authorized body, and can take the bill away from the House and reconsider it when amendments are being offered and after the House has done with it. The English Committee has no such decisive rights of intervention: it works within the limits settled by the House; Parliament as a whole dominates it in theory and, still, in practice, although the superior ability of the Committee wins it authority, for the House has neither the time nor the knowledge to review its decisions.

The German Reichstag. The formal march of a bill in the German Reichstag is through Three Readings. The First Reading is usually one of simple announcement without debate. If there is debate it is a short discussion of general principles.[1] But before the First Reading of any bill is undertaken the German Constitution of 1919 has created a number of stages outside the Reichstag. These, which are discussed more fully on the proper occasion, are important preparatory stages. When the draft has left the Ministry (which has normally obtained an expression of public opinion by publication of the draft), it goes, as in other countries with Cabinet government, to the Cabinet. In Germany it passes always through one more *preliminary* stage at least—it goes to the Reichsrat (the State Council), and there is subjected to a very close scrutiny from the standpoint of the various state governments who give their delegates general instructions.[2] Then, if the bill is of outstanding social or economic importance, it must pass through the *Reichswirtschaftsrat*, the Economic Council[3]; and sometimes, to save time, the bill appears before these two assemblies simultaneously. Only then, with the amendments accepted by the Government or put down as objections or advice, is the First Reading reached. Between the First and the Second Readings an interval of at least two days must elapse. The intention is obvious: it is to avoid surprise and inconsiderateness. But the rule is surely one for times of emergency only (when the minority is in danger) and when, in fact, it can be set aside[4]: for

[1] G.O. 37. [2] See Chap. X, *supra*.
[3] See Chap. XX, *infra*.
[4] G.O. 47. Cf. Morstein-Marx, *Problem des parlamentarischen Minderheitenschutzes*.

between the First and the Second Reading there is the Committee Stage which lasts many days.

The next stage is the most important one—it is the Committee Stage. It is possible for the Reichstag not to send the bill to a Committee.[1] But the practice in every case is to make the Committee the court of judgement within the very wide limits of whether the bill shall be passed at all or not. We shall return to the meaning of the Committee Stage soon. The Second Reading follows two days *after the Report of the Committee, an important advisory document*, has been distributed. This Reading is, as a rule, confined to the articles, and does not spread, without special permission, into general discussion, except for the speech of the Reporter of the Commission. Amendments are freely put. An interval of two days is the minimum between the Second and the Third Reading.

The Third Reading is a rather formal editorial stage, with little debate; though by the rules the general principles may be discussed, and amendments may be offered when supported by fifteen members.

The U.S.A. The American House of Representatives has the system of Three Readings, but debate is so closured, so cut and dried by the parties and the Speaker, that it is hardly worth while speaking of these stages. The Committee is here more than anywhere else, everything; the House, nothing. The First Reading is merely one of notifying the House in the Journal and the Record that a bill has been introduced bearing such and such a title. Then the bill goes to Committee, which always amends, and often kills, the laws. If it ever emerges, its Second Reading is the occasion for a discussion of the articles and amendments thereto. The Third Reading is almost purely an automatic and undebated acceptance of what has resulted from the previous stages. The broad forms are those of the English Parliament in Jefferson's time: but American experience has charged them with such a different meaning and balance that the two systems have ceased to bear any resemblance.

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Why are these stages still existent, when parties and the Committee system are so vital to the procedure, and strong in their influence over the evolution of a bill and its discussion at each turn?

Apparently, because when stages are named they give the impression of orderly progress; each one implies notice and advertisement to all who are concerned. and this adds to the authority of the law; and as long as successive and separate forms are prescribed any one of them may, in the case of need, be used in a ca' canny fashion, with all emphasis upon their obstructionist possibilities. They are possible safeguards against potential coercion of the Opposition by the Government, and of the rank-and-file by their leaders. They also look back

[1] G.O., Art. 38.

to the days when Parliaments needed every means of obstructing the Crown and its friends.

Now in England, on the Continent and in America, the Readings have ceased to be real discussions packed with thought. Few are the *decisions* which emerge therefrom. The Parthian shot allowed in France, and the general discussion allowed in all countries on the final reading, are indicative of the modern meaning and practice of parliamentary debate. It is a conscious address to the world outside the House. It is speech for *Hansard* and the *Congressional Record*; for *Le Temps*, *Der Tageblatt*, *The Times*, and *The World*. Here is the chance of informing the country, agitating minds and consciences, and of the mutual exhibition of the excellences and deficiencies of government and opposition parties. In England the Government, in France the Government and the Commissions, in Germany the Government and the Commissions, in U.S.A. the party leaders and the Committees, decide and debate: the rest is advertisement, explanation, electoral strategy, the joy of talking, and sealing-wax.

'Everything before this (the Second Reading) is usually so prepared by the resolutions of the parties assembled in special meeting and by their representatives in the Commission that the Plenum has in important bills only the rôle of the choir in classic tragedy: to justify the behaviour of the chief actors (the Commission and the Government) *after the fact*, or to make it plausible to the outer world. . . . (The Reichstag) has in principle agreed . . . that the President could at discretion call on a speaker for a general declaration on behalf of the party when the preamble and title of the bill were being considered. The only point of dispute was whether this should be raised to a "right" and not to depend on the benevolence of the President. The choral accompaniment of the House in the Second and Third Readings to that which the Commission has resolved, in combination with the Government, has therefore found its recognition in parliamentary practice. It only awaits its formal recognition in the Rules of Procedure!'

Thus for Germany.[1]

Absenteeism and the Private Member. 'When the President called: "Deputy Müller-Hinterwalden has the floor!" the House was almost empty. Annoyingly; even the seats of his own party!'[2] And so, too, other legislative bodies.[3] It is a well-known fact that during legislative debate the House is attended by a mere handful of members, unless upon the general discussion; and when technical points, perhaps of very great importance, are under discussion, mem-

[1] Hatschek, *Deutsches und Preussisches Staatsrecht* (1923), II, 49–51.

[2] Lambach, op. cit., p. 96.

[3] Cf. Luce, *Congress* (1926), pp. 19, 20; cf. *The Times*, Dec. 12, 1930, p. 14, on the 'count out' of the House of Commons when Sir John Davidson's resolution on Economy was before the House. 'Even yesterday they (the absentee Conservatives) did not seem to realize that they had placed Mr. Baldwin in a most humiliating position. It must be remembered also that the Whips have had the greatest difficulty in securing a full attendance of Conservative members even when a three-lined Whip has been issued.'

bers are in the libraries, the buffet, the smoking-room, or are present with ineffable boredom and imminent sleep on their faces, wondering why on earth he or she will go on talking. It is notorious, also, that members vote without having heard the discussion. In France, which is an exception in this matter, voting by proxy is allowed; members may not hear even a single word said for or against the bill in all its stages. Their friends have the little counters, blue or white, with which to determine the numerical support of, or opposition to, a bill.[1]

The truth is that parliamentary power is, in the matter of legislation, only exercisable through the party, or in close concert with a small number of colleagues who are specially entrusted with the duty of responsibly thinking and advising the House. Time prevents everyone from participating in discussion, time prevents all amendments from receiving consideration, the lack of continuous and informed relations between a single member and the constituency makes undesirable his independent activity, and makes that of a party more desirable from the standpoint of representation; previous study is needed to secure the substantial and formal qualities necessary to good law, and advocacy and defence are best received from those only who have pursued such study. The unattached member, the free-lance, the improviser, is left with little to do, with only rare opportunities of effective (that is, amendatory) criticism. He cannot stand against the power of united officialdom, government, opposition leaders, committees. His opportunities are only to be found with them, in the membership of these entities. We shall appreciate the truth of this when we have studied the general conditions of debate such as the order of speakers, the time-limit of speech, the closure of debate. But we shall also gain an important insight into the vital mechanism of legislative bodies if we now turn our attention to the constitution and functions of the Committees and Commissions of which we have been speaking.

PARLIAMENTARY LEGISLATIVE COMMITTEES

This must be remembered of the difference between England and other countries: that in England the opportunity of substantial amendment is granted or denied by the Government in full House rather than in the Committees.

The English Committee system has early origins, but they need not concern us.[2] From being occasional and unimportant aids to the House of Commons they were within a few years raised to a position of great importance. They were established on their new foundation in 1885: by 1902 they were spoken of as the 'keystone

[1] Cf. Delafosse, op. cit. This has been changed.

[2] Cf. Redlich, op. cit., I; and Usher, *The Institutional History of the House of Commons* (1924 Washington University Studies).

of the arch' in any amendment of parliamentary procedure. In the middle of the nineteenth century the House of Commons was already feeling that the burden of its work was more than it could bear: 'We are worked to death', wrote Macaulay to his sister, as early as 1832, 'and we are henceforth to sit on Saturdays. This, indeed, is the only way to get through our business.' In 1854, it was suggested before a Committee on Procedure, that bills should be considered in a select committee, not in the Committee of the Whole House.[1] This meant that instead of the whole House converting itself into Committee by the vacation of the Chair by the Speaker, and the loosening of the rules of debate, especially that which allows only one speech by a member on the same topic, there should be a body selected from the House to do the work. This Committee would sit in the morning twice a week, and thus relieve the House of time-consuming impossible tasks. Another suggestion[2] was for the division of the House into Six Grand Committees, on the style of the French Chamber. The suggestion failed. The House began to stagger under accumulating obligations and the obstructional tactics of the Irish. In 1878 it was suggested that one large Committee might be chosen to sit in the mornings and deal with bills of secondary importance, that to this committee one might add members specially interested in particular bills. The pressure on the House grew until it became intolerable[3]: the results were the Closure Rules, to be discussed later; and the institution of two Committees. The Committees were suggested by a strong Committee on Parliamentary Procedure,[4] whose Chairman was Lord Hartington, and among whose members were Sir William Harcourt and Sir Michael Hicks Beach—excellent parliamentary minds. They recommended the division of the House into four committees, each with a quorum of twenty. All bills except financial or confirmation of provisional orders were to go before them after their Second Reading. These recommendations were not accepted: but in 1888 a revision of procedure resulted in a revival of the Gladstone Committees of 1882, though the actual results of these Committees had caused some misgivings.[5] Two Committees functioned, then, from 1888.[6] The House, however, bent still lower under the new

[1] *Report of Select Committee of House of Commons on whether any alterations in Forms and Proceedings in this House are necessary*, 1854.

[2] May, *Edinburgh Review*, Jan., 1854.

[3] Cf. Gladstone, *Hansard*, 1136, 20 February 1882: 'The labour is harder, the arrears are greater, the dissatisfaction with the stagnant state of practical legislation is getting more and more lively; and, more than that, the suffering of the House has rather increased than diminished.'

[4] *Report, Select Committee on Parliamentary Procedure*, 1886 (No. 186).

[5] Cf. debate of 21 February 1887.

[6] Select Committee on Estimates Procedure (grants of supply), 13 July 1888, under the chairmanship of the Marquis of Hartington; Select Committee on Business of the House, 14 July 1890, under the Chancellor of the Exchequer, Goschen.

burdens imposed by the demands of a politically conscious and enfranchised democracy directed by the caucuses. In 1907 [1] large procedural reforms were undertaken, though in the teeth of a stubborn and acrimonious opposition. The 'Government's first proposals', according to the Prime Minister, 'which we consider the keystone of the whole building in regard to any change in procedure', were four Grand Committees, one of which was to be a Scottish Committee, all bills (except finance and provisional order bills) to go to them unless the House otherwise ordered, after the Second Reading. Thus there was firmly fixed into regular English legislative procedure a cog which was already important in other countries, but which had been vehemently resisted to the last (it must be said, on purely factious grounds), since all parties, when in office, insisted upon their necessity, whilst, when out of office, they pretended that a loss of authority was certain to be suffered by the House and ought to be resisted. For the time being the Committees were merely named A, B, C and D. The Scottish Committee was the outcome of the claim of Scottish members that their national affairs were given scant time, and that even when they were considered, they were settled by English members who knew nothing of Scottish conditions. For all public bills relating exclusively to Wales the Committee in charge was to comprise the members sitting for Welsh constituencies.

What was the effect of this change? Sir Courtenay Ilbert summed it up thus:

> 'The new Standing Order reverses the previous presumption as to the mode of dealing with public bills at the Committee stage. It proceeds on the views that when the general principle of a bill has been affirmed on its Second Reading, a reasonable chance ought to be afforded of having its provisions discussed, that this chance is improved by sending a bill to a Standing Committee, that, as a general rule, discussion in a Standing Committee is more business-like and effective than discussion in a Committee of the Whole House, and that the time of the House is saved by dividing the House into compartments for discussing the details of legislative measures. Thus reference to a Standing Committee is made the normal, instead of the exceptional, practice. The main exception to be decided by the House in each case will probably be where the issues raised by a bill are of such magnitude and importance as to make their reservation to the whole House in committee a matter of expediency, when the provisions of a bill are of such a short and simple character as not to require discussion in detail or, lastly, where the promoters of a bill are content with the Second Reading stage as an affirmation of principle and do not wish to carry it further.' [2]

This prophecy has been broadly fulfilled, but we have something more to say of the way in which the Committees have worked presently.

In 1919 the House again found itself in arrears with its work:

[1] Following the *Report of the Select Committee on the House of Commons Procedure*, 1906 (Nos. 89 and 181). See Balfour, pp. 10–27.

[2] Redlich, op. cit., III, 216.

legislation was stimulated by the War of Democratic Principle and Economic Acquisitiveness. Among the changes the Committees were increased to six—five general and one Scottish.[1] The members on the Committee were reduced from 60–80 to 40–60.[2] Further, it had previously been the practice to constitute these Committees on the basis of party strength in the House so that the Committees became its microcosm. As many members as its original numbers could be added for any particular bill upon which they were specially competent.[3] The representative character of the Committees was reduced in the change of 1919, and the number of special members limited to between ten and fifteen. The Committees were no longer limited to sessions before 2.15 p.m., as up till 1907, or 4 p.m. since that date. They could meet at any time they decided, except that their discussions were to be suspended during Divisions in the House. (Illuminating rule!) The Committees were reduced to five in 1926,[4] and their minimum number reduced to thirty, their maximum to fifty, their optional auxiliary element was increased from the maximum of fifteen to thirty-five.

How do they operate, and what is the opinion of the House upon their value?

Standing Committees are nominated by the Committee on Selection, which is itself established sessionally. The Committee on Selection consists of eleven members, who by the necessary practice of the House are experienced members nominated by the leaders and Whips of the parties in accordance with the numerical strength of the parties. In the composition of the Committees the Committee of Selection is directed by the Standing Orders [5] to have regard to the 'composition of the House, the classes of bills committed to such Committees', and to 'the qualifications of the members selected'. This means that as regards the ordinary Standing Committees the dominating considerations are party strength and loyalty, the geographical distribution of membership (rural, urban, North, South, etc.), and expertness, especially in the matter of the auxiliary members. In the case of the Scottish Committees all Scottish members sit, together with between ten and fifteen members nominated by the Committee of Selection, with an eye to the balance of parties in the House. When a bill relates to Wales only, all Welsh members are put on the appropriate Committee. Further, the Committee on Selection nominates a panel of between eight and twelve Chairmen of Committees, and these appoint the Chairmen of the Standing

[1] *Hansard*, 18 Feb. 1919, cols. 815 ff. These changes followed in the wake of the *Report of the Select Committee on House of Commons (Procedure)*, 1915, 378.

[2] S.O. 48.

[3] Which meant in practice very often those who were specially interested, from local or group considerations.

[4] Cf. Campion, p. 213.

[5] Nos. 47 and 48.

Committees from among themselves. The Chairmen are naturally supporters of the Government of the day.

They are applauded for their capacity for business and for the fact that when they vote it is usually a vote after discussion. The real question is, however, whether the discussion takes men out of their party positions. There is, in fact, a relaxation of party stringency owing to the nature of the things debated: they are usually outside the ambit of previous party judgement, and are of a quantitative nature, matters which are to be decided only when their scientific nature has been revealed. Thus there is sometimes room for give and take; the minority and the dissentients among the majority obtain their opportunity of proving the utility of concessions. It is difficult to put into general terms the latitude actually possessed by the Committees: it all depends upon the extent to which the majority has pledged itself, and upon how far legislation is upon matters of conscience (or instinct with a lifelong nurtured social bias), and, therefore, intolerantly sure of itself. Upon such bills as the Trades Disputes Bills of 1927 and 1930 no room for amendments could be offered.

In fact, as soon as the Committees went beyond verbal and minute emendation, they became the scene of party battles like those in the House, and the same problems of decorum, order and obstruction confronted them.[1] In 1905, when the need of the Committees had become so urgent, and experience was already sufficient to permit a judgement, the Chairmen met and reported many complaints.[2] Bills were being referred to the Committee for which they were not adapted; they aroused fierce controversies or excited acute religious susceptibilities, or the House referred them with a very divided voice. The operations of the Committees became stormy, and the minority felt bound to obstruct. If bills of this kind were to be referred, then the Committees must get powers of closure equivalent to those of the Speaker.[3] This indicates quite clearly how congested was the House. It found itself, in fact, obliged more and more to seek the aid of the Committees, and other interesting phenomena manifested themselves. It began to be pointed out that the representative character of the House was decreasing; for, it was argued, if 600 members are already but a minute and distorted mirror of a great country, is it not certain that a committee of sixty still less represents it? This feeling caused both members of Committees and the House in general to be jealous

[1] Balfour, *Debates*, 5 July 1905, 1156: 'Party spirit has penetrated even to the Grand Committees. . . .' Cf. Minutes of Evidence, Procedure Report, 1915, p. 13: 'The Government have got their supporters to support their Bills in Committee as a matter of confidence in them, and therefore there has been less latitude.'

[2] *Chairmen's Panel Report*, 1905.

[3] Cf., however, S.O. 47 (5): against irrelevance and repetition; dilatory motions; and on the closure.

of legislation; with the natural consequences. The minority on the Committees began to obstruct by calculated absenteeism, often standing outside the Committee-room until the majority made a quorum; or attempted to manœuvre into a position of majority for the time being.[1] This has caused serious annoyance to Chairmen and the majority, and results in a heavier party pressure upon members to assure a government majority. The time of members is claimed to an excessive degree. Secondly, the Report Stage in the House began to lengthen out, the members not on the Committee wishing to re-exert their control.[2] However, the rules of the House have checked this practice, but they have not quite solved the problem of order in Committees, since the dignity and authority of the Chair is not as pervading and compelling as in the full House, and though Committees are beneficial in that close contact causes mutual respect, dislike and contempt are also provoked.

Nevertheless, the consensus of opinion is overwhelmingly in favour of the Committees. For, in the first place, a generation has already arisen which knew not the more leisurely and easy ways of the past, and many of the new generation have graduated in the school of local government which, in England, is Committee government.[3] Secondly, it is realized that the Committees save the time of the House to such an extent that without them Parliament could never satisfy the legislative needs of the modern electorate. Thirdly, it is universally admitted that they do good work: considerable emphasis being placed upon the fact that they vote after hearing the arguments (this is unusual in the House) and that the Government is prepared to make concessions as the argument goes. These are great gains; but certain losses are suffered also. Complaints have been raised that there is insufficient publicity of committee proceedings. In fact, there are some official reports (of recent years only) but only for the bills which cause the acutest political differences (e.g. Trades Disputes Bill, and Rent Restriction); and the Press reports are very summary. The result is that the country loses what Parliament alone can offer if it is to be true to its name, and what it is important that representative government should provide: publicity of authoritative debate. Besides, attentive members of the House may get to know wherein the bill as reported differs from the bill as read a second time, but they are not informed of the reasons. These things, however, can easily be remedied. Sufficient, if not verbatim, reports could be published.

[1] Cf. *Debates*, 19 February 1919.

[2] *Committee of* 1906, Balfour, 14, 15; Ilbert, 37; Wortley, 47 ff.

[3] E.g. in the Session 1928–9: 15 bills were considered by Standing Committees (cf. *Return for Session* 1928–29, Parl Paper No. 0.001), 30 bills were reported on by Committees on Opposed Bills; 2 bills were reported on by specially constituted Committees, 6 bills were reported on by Joint Committees, 56 bills were reported on by Committee on Unopposed Bills (cf. *Return* (*Private Bills and Private Business*) *for Session* 1928–29, Parl. Paper No. 0.002).

The House of Commons' reported bills could approximate in form to those of the French and German Parliaments: they could contain the original bill: the amendments to it: and short memoranda explaining the motives for the acceptance or refutation of amendments. This defect is aggravated by the numbers of the Committees, and the extent of their labours. This enforced ignorance can be easily counteracted by the House adding to its usual printed material a weekly or fortnightly periodical giving a conspectus of the work and proceedings of committees. This will probably be of no avail for the average lazy member: but in all aspects of life we create devices accordant with the spirit of our purpose, in the hope that at least some of its servants will have the means of fulfilling the necessary tasks. Is it vain to trust that members will rise to the moral level of the institution?

The Overburdened Member of Parliament. How difficult this is may be inferred from the onerous burden of parliamentary work. A conscientious member is overworked. He starts at 10 a.m. and may finish later than midnight: in the morning he is in committee; at 2.45 p.m. he will probably want to hear questions; at 4 p.m. he may be needed in committee; there is correspondence—heaps of it—to attend to; and meanwhile the House is debating; on twenty days at least there will be the interesting and important subject of finance, nor can he ignore the days when the Executive is under criticism, for that still occurs in the full House, not in Committee. . . . But we shall have more to say about this and its consequences. Here it is enough to point out that if the work of Parliament is to be done with any continuous and loyal participation of members, the traditions and organization of the House would need to change. When we further examine this question we shall suggest the directions of desirable change. We shall show also what an impossible burden the present internal economy of the House throws upon Ministers.

It has been remarked [1] that instead of the Committees maintaining a permanent membership, which would constitute for bills an impartial jury, members who have exhausted their interest in a bill get discharged. Hence, there is a constant renewal of members, those coming on who are prone to take an expert or interested attitude. This has, of course, its disadvantage: it may result in minor tyranny when the moderating influence of the average member is removed. This influence can only be nowadays exerted by causing the expert to explain his reasons and motives: on the other hand, the non-expert member may be at a loss in the Committees. Is not the Continental and American system, which gives to Committees a permanent interest in specific branches of government, the only way

[1] *Committee of* 1906, Balfour, p. 13.

to make the Committees work effectively (that is, expertly), and of making the member capable of intelligent criticism? Even in local government where the field of work is different, experience has shown the answer to be in the affirmative.

Altogether, we may frame this judgement of the Committees of the House of Commons: designed to relieve the House of work for which it had no time, they have done this, and the House is ceasing to fret over this loss of its power; yet the House believes too little in the Committee system for a more substantial economy of its time. The incidental advantage of Committee work has been technically better legislation coupled with a moderation of the crudeness of party political judgements, especially as expressed before the electorate. The advantages over the Committee of the Whole in this respect are striking, yet there are bills which go to the deeps of political passion which are kept in the Whole, since this is deemed to be more public and representative than the Standing Committees.[1] These have raised problems of order similar to those in the full assembly, and they are a little more difficult of solution, for it is difficult to find so many men with the qualities of a good Speaker. The main question not yet systematically faced is this, will the House proceed to the rational organization of its business, with an appropriate place therein for the Committees? How that question *ought* to be answered to satisfy both the need for efficiency and the need for representativeness in modern government we shall better be able to say at the conclusion of this chapter. Let us now examine the experience of other countries.

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France. Since the Revolution French parliaments have always had committees as part of their organization to explore social conditions prior to the creation of law, or to revise the work of the Assembly. The difficulty was to prevent them from getting too strong and setting themselves in direct touch with the public. In 1848 (in the Republican Constitution) it was arranged that the Committees, each of some sixty members, should each correspond to a particular ministerial department, and though that desideratum has not been entirely realized, present organization has almost reached that point, and it is considered an important aim by many deputies. Already in 1848 there arose controversies which have reached down to our own day: whether it were better to have permanent committees parallel with the departments, or special committees which should last only so long as a particular piece of work. The former method was, and has since been, attacked, on the ground that the committees so organized began to interfere in the work of adminis-

[1] E.g. it was attempted to keep the Consumers Bill (1930) in the Committee of the Whole.

tration, their interference being fostered by their permanence and their growing expertness.[1] For decades, until recently, permanence and speciality were taboo: but little by little the nature of parliamentary business, and of the Deputies themselves, compelled a reentry on old paths though, of course, with modern improvements. In 1898 there began the practice of creating commissions to last through the entire term of a Parliament; that is, for four years; and the projects for a systematic organization of their work became very numerous.[2] Permanent Commissions were demanded because under the existing system the Committees could develop no traditions, could not devote themselves to a continuous study of a special subject, energy was wasted in the dispersal of members among new committees. All this was aggravated by the queer method of constituting the committees. This did not repose upon a party basis, but upon a principle rather calculated to stultify party leadership and control.

A glimpse into this procedure gives a most interesting insight into the political mind of the French. Even in the *États-Généraux* preparatory work on propositions was done in special divisions of the assembly called the *bureaux*. In 1789 the Assembly of the *Tiers État continued this habit—to form bureaux* where 'all the interesting subjects will be considered before being submitted to discussion'. The practice was later discontinued, but was resumed in 1814, and has existed ever since as an integral part of the Chamber. In this wise: the Chamber divided into a number of sections became, for various purposes, a number of corporate bodies. When the House was seized with a particular project, the *bureaux* nominated a commissioner (a representative or trustee) to enter into discussion with the Commission, and report back. If we reflect upon this phenomenon its meaning becomes quite clear: it was a method of bringing men together, of establishing personal and political relationships before the days of party organization. Some body, smaller than Parliament, and larger and more permanent than a fortuitous gathering of members, was needed; and the *bureaux* supplied the need. The general psychological causes of the *bureaux* were: the desire that *all* members should be informed of the work of Commissions before the Commissions took the lead in parliamentary debate; the desire to obtain for the Commissions some general instructions which could provide them with fairly sure bases of discussion. It is said, but we may doubt how far it was effectively true, that the members of *bureaux* were obliged to read the project before they voted for a commissioner to represent them.[3] More, people believed that the Deputies could then compare the previous discussions and the bill with the report of the Commission, and so clarify and concentrate debate. Further,

[1] Pierre, I, para. 737.

[2] Cf. Bonnard, op. cit.; *Notice Historique*, 87 ff.

[3] Pierre, III, 771.

the *bureaux* were expected to offer all members, however weak in oratorical talent, or shy of addressing a large assembly, a means of participating in the work of Parliament and of benefiting it by their experience. For the nascent leader the *bureaux* were a preparatory school of political tactics and debate, and many a brilliant improvisation in the House had first emerged in the *bureaux*. Lastly, frequent meetings brought together the men of various parties. Adversaries learnt to appreciate and esteem each other; sympathies and even friendships, which cannot develop in the feverish atmosphere of public sessions, are said to have sprung up there without difficulty. The number of *bureaux* varied according to the size of the assembly and the number of members it was deemed advisable to have in each: it varied from about fifteen to fifty. But the important thing was the manner of their constitution. This is the quaint and curious quality of the *bureaux* and this determined the nature of the Commissions until 1902. *They were never formed on a party basis!* They were sometimes chosen by the hazard of the alphabet. From 1848 they were chosen by lot. After a long and grave research an apparatus was invented whereby the names of the members were inscribed upon little balls and these were solemnly rolled down an alley, going by chance into one or the other of a number of compartments, each representing a *bureau*. For the *bureaux* thus constituted there was a complete and systematic arrangement of the order of procedure, their offices, and rooms. These *bureaux*, existing in both Houses, chose the Commissioners.[1]

The effects are obvious, and could only be allowed to exist until legislative business began to be important, and parties to be organized. Often the most competent members on a particular question were thrown together into the same *bureaux*, so that some were necessarily excluded from Commissions for which they were especially fitted. Chance ruined careers. A deep gulf often existed between the Commission and the Chamber, because the former grouped men on an entirely fortuitous basis. Sometimes there would be two Commissions with cognate propositions studying them in an absolutely opposed sense. The Government could never be sure of a clear path for its proposals.[2]

The Commissions were made permanent in 1902, and systematized by subsequent amendments of the rules of the Chamber. In 1910 the method of establishing the Commission by the *bureaux* was abolished in the Chamber. It was not abolished in the Senate until 1919.[3] By these two reforms the modern basis of the parliamentary commissions was established: party composition and permanence. Yet it is still maintained by many deputies that group election is dis-

[1] Pierre, I, 860.

[2] Cf. *Rapports*, Breton, Chamber of Deputies, 1902.

[3] Pierre, III, 711.

advantageous, because the group may be very small and contain *no one* of proper competence for a commission. While permanence in 1902 meant for a whole legislature, reforms of 1920 reduced the permanence to one year.

It is not a digression from the main theme, which is political behaviour and motives, though it is from our immediate object, to observe the attitude of the Chamber when this reform, the creation of a party basis for the Commissions, was announced. The defenders of the old system refurbished the doctrine that between the representative and the constituency no other entity should stand. The tenor of the discussion was this:

'We were not elected as members of a party but as individuals; we have a mandate of personal confidence. No one here ought to vote as members of a party; and most of us may belong to parties, but we vote as our constituencies require. Individual competence, not our political party, should determine the choice of commissions. Besides, we can agree with each other, although apparently the parties are irreconcilable.[1] What, force us into a group or a party! We are jealous of our independence!'[2]

The word 'group' was substituted for 'party'; and, for members of the Assembly who did not belong to a party, a group was specially established for representation on the Commissions—the 'group of the non-inscribed'. An attack was made on the system in 1920, but was repulsed.

The Commissions are *annual*.[3] The term of the Commissions was reduced because it was found in practice that Commissioners needed the spur of election or ejection to keep them seriously at work. But, in practice, members remain for very long terms upon the same Commission. Many—enough, at least, to cause criticism—join Commissions to obtain an honorary title and the right to molest the Departments.[4] It was found also that a long period of activity in the Commissions did not necessarily result in the acquisition of *expertise*. It ought to have that result: but absenteeism was encouraged by a four years' term of office. The Permanent Commissions now number twenty and are almost parallel with the great Departments of State.[5] They are not quite parallel, since some of them have a field of activity

[1] Lemire, 1 July 1910, Chambre; *Debates*, II, 474. [2] Sibille, ibid., p. 478.

[3] Change from the *Résolution* of 1902, to Arts. 11 ff. of the *Règlement* of 1915 and 1920.

[4] Barthélemy, *Rapport*, 23 Jan. 1920, Chambre, *Debates*, I, 36–40; Louis Marin, 27 Jan. 1920, ibid., p. 53 ff.

[5] *Règlement*, Art. 11, and *Résolution*, 27 Jan. 1920: 1. General, departmental, and municipal administration; 2. Foreign affairs; 3. Agriculture; 4. Algeria, the Colonies and Protectorates, 5. Alsace-Lorraine; 6. Army; 7. Insurance and social insurance; 8. Commerce and industry; 9. Accounts and economy; 10. Customs and commercial treaties; 11. Education and fine arts; 12. Finance; 13. Health; 14. Civil and criminal legislation; 15. Mercantile marine; 16. Navy; 17. Mines and power; 18. Liberated regions; 19. Labour; 20. Public works and communications.

covering more than one Department. In 1920 this subject was carefully considered, and parallelism deliberately rejected. Those who desired it argued that every Commission so constituted would relate itself to a particular ministry so continuously and exclusively that the consequent knowledge of its work and officials would make it a potent and capable controller of the Executive.[1] But the reasons which prevailed against this were the importance of the Commissions in drawing together Departments by requiring the co-operation of several before them, of not adding the rivalry of *rapporteurs* to that of the ministers, and of not organizing the Commissions on a basis which might contribute to conflicts between them and the Government.[2] Parallelism, said the Commissioners, would mean the organization of conflict, resulting in the 'effacement, to the country's great damage, of the responsible ministry by the irresponsible Commission'.

The Commissions are appointed by general vote of the Assembly, and no member may serve upon more than two Commissions.[3] To prepare for appointment the groups convey to the President of the Chamber the list of their followers, and their candidates for the different Commissions. Each list of candidates thus proposed is considered as elected unless challenged by fifty members before the day of official nomination. And a challenge is followed by an open vote. Of course, there are no challenges.

The Commissions are composed of forty-four members each. To this the Commission of Finances is an exception; it is the most important and powerful, and has fifty-five, and I treat its organization and functions separately in the section concerning financial legislation. Each Commission elects a President, Vice-President, a *Rapporteur*, and Secretaries. The President is Chairman and the official channel of ordinary communication between the members and other official bodies like the Chamber, and the Ministries. He intercedes personally in grave cases. The position is much sought after since it is one of authority and influence, and has a prestige-value. It is not necessarily—in fact never—held by a member of the government of the day, and that for various reasons: the desire of Deputies to keep a check upon the government and to establish offices rivalling the Ministers (since there are not enough ministerial offices for all the Deputies), and the desire to support men of experience and expertness, former ministers, former Prime Ministers, perhaps future ministers. Similarly with the *rapporteur*. This is an onerous office, for the *rapporteur* is responsible for guiding the work of the Commission from the standpoint of policy, while that of the President is to guide it from the standpoint of domestic order and its relations

[1] Louis Marin, *Rapport*, 24 Jan. 1920, p. 52.
[2] *Ibid.* (The majority of the commission).
[3] Art. 13 and Amendment of 27 January 1920.

with the outside world. The *rapporteur* reports the views of the Commission to the Chamber (and to the outside world) and then guides the discussion in the Chamber, a function undertaken in the first place by the President, and then by other prominent members. The position of the *rapporteur* is one much sought after, for it offers the opportunity to acquire prestige in the Chamber and with ministers. The name of the *rapporteur* is published in order that those who wish to know how the work is progressing may know to whom to apply. Better to be a *rapporteur* of a Commission, which has much to do, than the President of a Commission not in the public eye. The choice of *rapporteur* is determined by the considerations we have mentioned in reference to the Presidents. Most often the recognized experts are chosen; sometimes ambitious young men.[1] Upon government bills it is clear that the government can secure a *rapporteur* favourable to its own attitude: he has been called 'naturally the organ of the majority'; for being based upon party, the Commission contains group elements corresponding to the strength of groups in the Ministry, and not infrequently they go to members as a compensation for non-inclusion in the Ministry, or to various groups as part of the bargain leading up to the coalition. I will touch upon the general political effects of the Commission system later.[2]

Until quite recently the technical apparatus of the Commissions was rather rudimentary. But their growing importance caused attention to be concentrated on the need for a permanent residence, archives, library, permanent secretaries, and telephones. Minutes had been badly kept and a permanent staff was urged not so much in order that the public should be provided with full reports, but because these would fix responsibility, define arguments and stimulate ing collective and personal interest of members in the work. Since of 20 the Commissions have improved in this respect[3]: the Commis- of n of Finances has a permanent body of officials; the others are lserved by the *Service des Commissions*, which, so far, is not adequate. A weekly bulletin of work in progress is published.

Every bill, whether governmental or otherwise, goes to the appropriate Commission; this being settled by the President of the Chamber. Where it is uncertain which Commission should be asked to report upon a bill, or if it is desirable that two Commissions with cognate fields of interest should be consulted, this is easily arranged by a vote of the Chamber: they may deliberate in common, or the

[1] E.g. Briand, in 1906, to report upon the State and Church Bill.

[2] Increasing work has caused the election of several Vice-Presidents, Secretaries, and *Rapporteurs* (see *Résolution*, 16 June 1903). The peculiar psychology of the Deputy caused an ever-increasing number of these to be elected. In 1915 the Vice-Presidents had to be limited to four; the Secretaries to six.

[3] 27 May 1920: 'The Grand Commissions . . . shall be provided with a staff and residence, specialized and permanent, as well as the necessary instruments for the work.'

principal Commission is instructed to seek the advice of another. Most important of all in these inter-commission operations is the rule and practice that where finance is involved the Commission of Finances shall send consultants to the principal Commission. It is said that co-operation between Commissions is impeded by their number, and on this ground, a few experts suggest their decrease to fifteen.

The Commission's report must have been distributed six days before the Chamber enters upon debate; as concerns the Budget, the period is ten days.[1] The Commission must report within four months [2] of being seized with the proposition: a period which was set in 1920 because many Commissions had not reported, either because they were hostile to a private member's bill, or because they wished to annoy the government, and, if not, the author may withdraw it from the Commission and have it placed on the Order of the Day, which the Chamber, of course, may refuse. If a money bill is concerned the author needs fifty supporters to withdraw a bill from a Commission.

How, then, does the Commission use its four months (or more if it is necessary, less if the matter is by nature easily disposed of or urgent)? There is a series of private sessions; the public is not admitted, and even members of the Chamber may not sit as spectators.[3] This is defended on the grounds that members are more conscientious when not acting in the public eye, and that secret information, especially on administrative activity, could not otherwise be reported. In these sittings, which may take place even when the House is in session, experts of the Departments, members, official documents, and communications from unofficial sources are examined. The experts and the ministers could keep away from the Commissions if it were to their profit; in fact, the Commissions have such an influence upon the course of legislation, they are set into so high a position of authority by the general opinion of the Chamber, they are so much an essential expression of French parliamentary life, that both the official staffs and ministers do everything in their power, promising even more, to help them. The Commissions even descend upon the competent Minister when necessary or convenient and discuss their work with him and his administrative chiefs. Such deputations are, however, in strict law merely unofficial conferences; the official seat of the Commissions is at the *Palais Bourbon* and the *Luxembourg*. The Chamber has not yet decided that representatives of the public may appear before the Commissions. But the pressure upon the Commissions by written communications has become great enough

[1] *Règlement*, Art. 95. [2] Resolution, 27 May 1920, Art. 29.

[3] This was not always so; but members not belonging to the Commission were wont to break in with interruptions and exclamations. As we shall see, the only exceptions to the privacy of the Commissions is the right of the authors of propositions and amendments to attend and to be heard.

to cause consideration of such a reform. Some members have come to believe that hearings should be open.

'The time has passed by when the commissions were chapels closed to the public and even to the Deputies who are not members of them. The recognition of publicity, control, and the co-operation of public opinion in the work of government, has made close relations between the Chamber, the Executive, and the public essential.' [1]

It is beginning to be seen that the best work cannot be done if reliance is placed exclusively upon written reports.

'Written procedure, exact records, certified statements are more and more used in the hurried and complex world of to-day, to preserve evidence, to fix responsibility, to avoid error and to supply useful information; but the method of open discussion gives fine results, because questions and replies, suggestions and criticisms, born suddenly, can be accepted or refuted at once, by immediate invitation to re-statement, or by explanation and agreement, by supplementary questions, the examination of experience, allusions, suggestions, understandings, etc.'

To exercise an influence ('precise, permanent, tenacious and certain') upon the Commissions, the members of the public to be heard must be experts and the representatives of associations. But the Commissions have not yet officially the power to admit such persons into their deliberations, and though this does not prevent them from unofficially consulting them, it would be better for the members, the experts, the associations and the public to regularize open consultation.

The Commission must hear the authors of a bill,[2] and the authors of amendments, if they wish [3]; and, of course, the Commissions may and do call them. Members so appearing before the Commission can only support their own proposals, but not express their opposition to other parts of the bill, though where the subject under discussion is difficult, the Commissions allow considerable latitude in order that subsequent proceedings in the Chamber may be facilitated. The reports issued by the Commission are printed and circulated to members. They are usually composed of the following elements: a carefully written history of the problem; an analysis of the immediate social situation which has evoked parliamentary action; a critical description of earlier legislative proposals; a critical examination of the project before it; and its recommendations. There is no doubt in my mind that the French Deputy has in this report, *if he cared to make use of it*, a far better basis for participation in debate than anything available to his British or American colleague. He has not only the record of work, but also the *reasoning* upon which it is based. The minority has, however, not been given the right to present a

[1] *Chamber of Deputies, Annales, Documents*, Feb., 1920, p. 374.
[2] *Règlement*, 35. [3] Old Art. 56.

separate report. The Commission reports as a single entity. How far the dissentients whose views have not been given systematic expression in the report obtain other opportunities in the Chamber we shall now see.

At a date fixed by the President of the Chamber and his colleagues for the settlement of the Order of the Day, the bill is debated. The members of the Commission occupy special seats to enable them to act together during the sitting. The *rapporteur* takes the lead in debate, and is usually first at the tribune. By the growth of custom, and later by amendments to the rules, the *rapporteur* and the President were given the right to intervene at any time in debate, at their own discretion: that is, they might begin if they wished, interrupt whenever it suited them, and make their chief contribution at a point favourable to the success of the debate and the work of the Commission. In the regulation of the time-limits for speeches which was established in July, 1926, only the Government has unlimited speech; the presidents and reporters of the Commissions have the limit of one hour. The time of other members is considerably curtailed. The minority has no official organ, and no special priority in debate; but the convention has been established that a member who speaks in the name of the minority of a Commission may be accorded a place out of his registered turn, if the Chamber agrees. It is a courtesy the Chamber rarely denies. Further, the minority may have its opinion summarized and published in the *Journal Officiel* at the end of the report of the debate.

Thus the Commission system provides a *bloc* of twenty or thirty fairly expert members, *before* the principal debate commences. Their leaders have a special priority in debate. The time of the assembly is saved: the possibility of informed debate is provided. Technical questions have been threshed out beforehand, and the principal amendments have been considered. Moreover, as we have already indicated, the Commission is vigilant all through the debate, especially in that on the articles, for no new amendment can be put without its assent and in many cases its report. Before the discussion opens the Commission may announce that it has modifications to make to its own reported bill. It may make up its mind upon amendments in the House, or if it requires time, or wishes to delay, it may ask for a suspension of the sitting. Any article may be taken back by the Commission (a majority of the members) from the House, when it perceives amendable faults. Although this power is exercisable only on the article and amendments, the Chamber rarely refuses a recommittal when asked for even during the general discussion, since it is deemed that the Commission is a better judge of the necessity. When all the articles have been voted the Commission may obtain a recommittal of the bill, since it is agreed that after amendments

have been made, some repairs will be required. All through the debate the bill produced by the Commission is the basis of debate. If its principle is denied it is recommitted. When the Commission nods its head an amendment put in full session does not require to be formally commended to the House in order to be considered; and that amendment may be modified verbally, accepted with qualifications, or rejected altogether by the Commission. The *rapporteur* or the President can, in the name of the Commission, demand the committal of an amendment. This large power was granted because it sometimes happened that a quorum of Commissioners could not be obtained quickly enough during a session. We do not need more information to realize that the legislative power of the Commissions is very extensive.

The general effects of the Commissions are far-reaching. The Commissions have become so powerful as to challenge the leadership of the Government. They dispute with it the control of debate, demand explanations before they admit its contentions. This is an unthinkable situation in the British political system, where all revolves around Ministers and their friends. What appears to have happened in France is this: possessing neither the organization nor the instinct for party, it was ultimately necessary to invent some other means of grouping and leading members, and the Commissions were the result. Having come into existence not by the good will and creative activities of governments, but as a result of parliamentary necessity, and possessing, therefore, an independent claim to authority, they are truculent to the Ministers. No party claim of any real strength and certain effect diminishes their claims to independence; the interests of *their* career are as justifiable as any Minister's, and the Minister certainly has no more solid foundation for his power than the Commissioner. They are almost of a stature: now one and now the other is more powerful. For nothing necessarily subordinates the one to the other. Hence a continual contest: expressions of contempt, snubs, sarcasm. The Ministers have arrived: the Commission has yet to arrive. The stronger-willed Prime Ministers complain bitterly of the pretensions of the Commissions. Poincaré, for example, says: 'But I am wrong in saying that there are two Chambers. There is a much larger number, as nowadays each Commission aspires to the same privileges as the Chambers themselves.' [1] It is noticeable, however, that these complaints are not based upon a simple consideration of the legislative work alone of the Commissions. On the whole this is not the subject of criticism, but rather of praise. The complaints are directed rather against the financial and administrative control sought by the Commissions, and of these we speak presently. The power, however, to review the work of the Departments and to interrogate Ministers

[1] *The Parliamentary Régime in France*, *Empire Review*, March, 1926, p. 309.

may be bad for the relationship between the Executive and the Legislature, and from an English point of view it is easy to criticize this: but that power is essential to the ability to amend and redraft projects of law. The powers are related, though it is not necessary to adopt the bad habits of the Commissions to secure their advantages. The Commissions are not an accidental engraftment upon the French political system, but are the direct outcome of French political psychology. They must, for France, be judged upon that basis. It is useless to judge them by English standards as Bryce did. He said that 'the power of these persons who seem responsible because they were the original authors of a measure, or who can be made responsible to the public because they hold an office, being thus reduced or destroyed that they cannot fairly be treated as responsible, actual control has passed to bodies whose members, debating in secret and holding no office, are not effectively answerable. The nation cannot, if displeased, punish the latter and ought not to punish the former'.[1] This is true and important. But it does not allow for the fact that French ministries are swiftly-changing coalitions of groups without substantial organization in the country. *There* is the root of the evil, and it is partly to overcome the weakness inherent in such a system that the Commissions have arisen. In any case the line of responsibility is faint and discontinuous. The Commissions at least provide the machinery of parliamentary leadership in legislation, and whatever the faults of the Deputy the machinery is good: for it supplies expertness, links the members with each other in an active and effective group, and saves time.

Those faults are plain to the eye. The reports are sometimes excessively long, striking rather than useful, weighty, but not with intelligence. There is a tendency to disintegrate groups, since tactical importance upon the Commissions may be won sooner by the leader of a small group than by a subordinate in a large one, and the general body of deputies would prefer more Commissions rather than less. There is the chronic evil of absenteeism.[2] It has been suggested that failure to attend five consecutive meetings should result in the discharge of the member; and the application of the rule that members present, excused and absent should be listed in the *Journal Officiel*. The quorum was raised from a quarter to one-half the membership; the rule relating to notification of absence was amended to include a statement that the consequence was the lack of a quorum; the rule relating to discharge was adopted.[3] *Yet these rules are not in fact effective.* Absenteeism is serious, and resolutions passed in one day,

[1] *Modern Democracies*, 1, 277.
[2] See e.g. *Documents Parlementaires*, Chambre, Séance, 12 Feb. 1920.
[3] *Règlement*, 30, amended by Resolution, 27 May 1920, Art. 7.

may be overturned another because three or four members have remembered to attend.

This machinery differs very much from that of the British House of Commons and chiefly in these features: consideration of the bill in the House is preceded, not succeeded, by consideration in Committee; the examination and report extend to the principle of the bill; the House is guided by the Commission and the Government, not solely by the Government; the alignment on the bill is less a party alignment than in England.

Germany. The German system is much the same as the French, except that a German Government has a greater control over the progress of the bill than has a French Government; and it may be that this system of Commissions and strong Government leadership offers a sound way out of the congestion of the House of Commons and towards the resurrection of the private member.

The German Committees were evolved long before the establishment of the Republic, and they were well adapted to the demands of a constitutional monarchy in which the Government settled the principle of a bill but was willing to have the technical help of the parties to whom, also, it was ready to make concessions of detail in return for a show of popular support. They have become even more important with the advent of popular sovereignty, and the immense increase of functions of the Federal Parliament. The present practice is to debate the Second Reading only after receiving the Committee's reports. There are its permanent committees, each with a membership of twenty-eight.[1] Members are nominated by the parties in proportion to their strength, *and no Group with less than fifteen members can be represented.* This regulation regarding the size of a representable Reichstag *Fraktion*, is intentionally to discourage the break-up of parties, and to encourage arrangements between small Groups, and between these and larger Groups—the smaller Groups who combine with the larger are called *Gäste* (guest) or *Hospitanten*.[2] A battle rages round the Chairmanship of each Committee. The rules only say that these are chosen by the Committees after consultation with the directing Committee of the Reichstag. In order to avoid endless conflict and revenge when the fortune of elections turns former

[1] 1. The inter-sessional Committee to invigilate the Government; 2. Foreign affairs; 3. Rules of Procedure; 4. Petitions; 5. Budget; 6. Taxation; 7. Accounts; 8. Economic affairs; 9. Social affairs; 10. Population Policy; 11. Housing; 12. Education; 13. The administration of justice; 14. Civil Service; 15. Transport. The number of each committee is determined from time to time by the Reichstag.

[2] Cf. *Bericht*, No. 4411, p. 20. The term *party* was suggested, but the old word *Fraktion* was retained, apparently because it was usual, and reduced as much as possible the notion of the party *outside* the Reichstag as a ruling element. Further, some wished to raise the representable size of *Fraktionen* to at least twenty-one, but fifteen was adopted as a concession to minorities.

majorities into minorities, an automatic method has been invented. The largest party is allowed to claim what it considers the most important Committee; then the next largest, and so on, down the list of the parties, to that one which is *very* much below its predecessors in numbers. The first begins again, then perhaps the fourth, then perhaps the second, the third, the fifth, and so on right down the list to the bottom. The psychological basis of this system is important: it tells us a good deal about parliaments. Number must prevail; yet where there are many parties, none with a decisive majority, arrangements must allow of the permanently smooth cohabitation of all; revenge may be the result of the crude use of power: especially when there is never any certainty that one's majority will last. Those who are not accommodated in the Committees are apt to obstruct in the full House, while when responsibility and favours are heaped upon parties their opposition is blunted. Hence bargains are struck regarding these and other offices.

Every party in the Committee has a Chief; he is the registrar of entrances and exits, the Whip of his party. The Chiefs ratify the choice of a *rapporteur* made by the President (the *rapporteur* is usually a member of the next largest party to that of the President). A secretary is also selected.

The Committees, acting fully on their own party principles, have full powers to report the bill as they wish; and they are liberal in the interpretation of their powers of examination and revision. They work hard and systematically. They call before them Ministers and departmental officials (these, as well as delegates of the several States, have the *right* to attend), and send for the documents they need to the appropriate department. Since no one but members of the Committee and the initiators of the bill have the right to be present,[1] it is impossible to bring before them outside experts as witnesses who belong to the vocations affected by the bill. Hence, in the capacity, not of a Committee of the Reichstag, but of members who are acquainted and are interested in a common object, they have invented a kind of session called 'interviews'.[2] These have become a very valuable means of helping the members to decide questions not known even to their official assistants. Further, representatives of interests stand outside the door waiting to be informed by the Deputies, who are at their beck and call. Ministers, departmental experts, the members of the Committee and the 'interviewed', meet together and thresh out the disputed truth. Only a careful analysis like that of Lambach or Gustav Schneider's [3] can give an adequate

[1] Go. Art. 34. However, members may be present simply as audience. Moreover, the Press Department of the Reichstag issues a report of the discussion and the results to the public through the Press and the *Reichsanzeiger*.

[2] *Besprechungen*. [3] *Briefe aus dem Reichstag*, Berlin, 1927.

account of the energy, concentration, and expertness with which the Committees do their work. To which must be added the cunning of party tactics. In these Committees, also, a good deal of leadership falls to men and women who are connected by other than parliamentary ties to outside organizations. Their discussions and demeanour are not seldom those of negotiations between the delegates of opposed vocational interests. The sub-committees report back, the Committee assembles their work, and votes the amendments; the reporter is ready with his report. Of course, the work of the Committees is highly valuable; it has been said that they are 'more concrete and productive than the debates in the Reichstag, where debates on order, personal conflict, party acrobatics or obstructionist speeches prevent the subject itself from ever being debated.'[1] The smallness of the Committees and the exclusion of an audience are considered to be vital elements in their success. Here, too, are complaints of absenteeism.[2]

The report is distributed, the Reichstag is ready for the Second Reading. *It is from this point that procedure in Germany differs from that of France.* Already the Government groups have fixed their indelible and characteristic mark upon the bill. Now the members of the Committee take their account to their own party caucus which, at a special meeting, chooses one of them to recite his view of the situation, and to advise them on their attitude. The caucus makes up its mind; and designates a chief speaker. He is to utter in the Reichstag, not his attitude, not the mind of the report, but the views of his party upon the report. He is strictly bound by party instructions. The member is the delegate of the party community, and he feels the restraints imposed upon him.[3] The Committee has ceased to be responsible for its report, in the sense of the French parliamentary committees; and its members may know more than others and exercise authority in that way, but since the deposit of their report, they have, as far as the bill is concerned, returned to their party groupings. The parties do not speak in a voice so fully affected by their Committee's experience as do the French groups, but their speech is now that of a person who has commenced with a party philosophy, has applied it, to its own modification, to a particular proposition, and then come back again upon the result with a further examination in the light of his party philosophy. The majority parties invariably have their own way, though this way itself is, in the condition of so many parties and coalition governments, a devious

[1] Cf. Hauffe, op. cit., p. 23 ff. [2] Cf. Schlegelberger, op. cit., p. 25 ff.

[3] 'Muller is quite bewildered. He would have liked to have expressed his own opinion. But here he is taught that he speaks as the representative of a community and that therefore he has to express the general will of this community. . . .' (Lambach, op. cit., p. 96.) 'He has never before stood on a platform so unfree and so bound.'

one. The tactics of successful coalition government are pursued in the Committees as well as outside: for the Government's majority is there and has to be kept together, and, since that is so, the coalition leaders determine the attitude of the parties within the Committee.

The Second Reading, which follows, is a trial of strength between Government and Opposition parties, which may result in the detachment of strength from the Government and even in its downfall. Against obstruction are pitted all-night sittings and the prolongation of the session. But the Committee is no longer the master or the servant of the Chamber. It has done its job: very little of it will be undone; but how much of it can survive depends upon the relative strength of the Cabinet and the Opposition. The Cabinet, at any rate, is in command, and most usually in power, from the beginning of the Second Reading to the ultimate division on the Third Reading.

Party. We see what a large part is played in all these parliamentary arrangements and functions by political parties. The time has not yet come for a final survey, but the omnipotence of party is already in plain evidence. The chief entities which manage and guide Parliament are parties; they provide the policies, conduct electoral power, struggle, concede, make engagements, and conclude bargains, while the organization outside Parliament keeps in touch with that inside, so that the connecting channels are never really broken and ideas and feeling never cease to circulate from the centre to the extremities and back again. The parties manipulate the broad streams of will to irrigate the vast fields of government, and the general mind which has been created and fostered in the electorate is trained upon the technical details of legislation. It is only when the party has arrived in Parliament that it arrives at complete self-consciousness, for only then does it discover all the problems which it must answer. Nor does it really know its opponents until it meets them in the House and in Committee; but until it knows its opponents it is clear that it does not fully know itself. We have seen that this meeting occurs fruitfully in the Committees, and to a lesser extent in the debates in the House. We must presently observe the conditions of debate in the House and consider their effect upon parliamentary government, and see to what extent political parties are concerned therein.

Committees in the U.S.A. The Congressional Committee system has evoked a large literature, and properly; because the Committees fulfil functions even more important than those of Continental parliaments. The reasons for the magnitude of their place in Congress are, the non-existence of the kind of systematic leadership available in countries where the Cabinet system prevails—where the Executive leads Parliament on the floor of the House; the large number of laws which Congress is called upon to consider; the short

duration of Congresses, which causes a fearful congestion, and very strict closure in the House; and the relative mildness and non-existence of party differences about many of the bills initiated, which makes Committee work fruitful, since successful argument is not precluded by adamant prejudices. There are about sixty Committees in the House of Representatives,[1] but only twenty of them are continuously at work upon important subjects. Among the twenty there are half a dozen so-called 'major' Committees (those of principal dignity and power) whose reports may be brought into the House at any time.[2] These Committees were, until 1911, appointed by the Speaker; since then, for reasons we have amply explained, the power was vested in the House. Since the being and activity of the House are based upon the party system, the nomination of lists naturally fell to the parties, each of which adopted a method which, though slightly different, results in the same thing: appointment by the recognized leaders of the party. This result is not very different from the situation which the revolt of 1911 attempted to overcome, but selection does not lie as much in the hands of one man as it did. The Democrats choose their members by the selection of their portion of the Committee of Ways and Means at a party caucus, and these Committeemen are authorized to act as a Committee on Committees. As the Committee of Ways and Means holds a vital position in the business of the House, both as a regulator of priority and a leader in debate, as well as an authority on some branches of financial legislation, it is clear that for this reason alone the members elected to serve upon it are certain to be the party leaders and wire-pullers. Since there is added the secondary task of selecting committees, party grandees only are chosen. The Republicans since 1919 have selected through a Committee on Committees, composed of one member from each State with Republican Congressmen, each with votes proportioned to the size of its delegation to the National Convention. The recommendations from this Committee purport to represent the 'party' as distinct from the leaders of the party—but the end is almost the same: the caucus ratifies, but the leaders make up the slate. The difference between 1911 and 1931 is slight, but there is a difference: the leaders operate under a silent but sensible pressure. The institution embodies a revolt, and the revolt expresses a demand; and this the leaders cannot help feeling.

Experience shows that certain conventions are influentially directive, if not binding, upon the party leaders in selection. The most important is 'seniority'. It has been shown that the Chairmen of

[1] Cf. *Manual*.

[2] The Committee on Ways and Means, Appropriations, Banking and Currency, Rivers and Harbours, Military Affairs, Naval Affairs, Interstate and Foreign Commerce, Judiciary, Agriculture, and Post Offices and Post Roads.

the ten most important Committees had a minimum length of service of from three to fifteen legislative terms.[1] It is assumed that those who have served longest will know the rules and habits of procedure, the ways of the House, the tactics of debate, the officials of the Departments whose field of work corresponds with theirs, the frontiers between the jurisdictions of the various committees, and the history of previous legislation.[2] This rule of appointment is as good and as bad in the selection of committees of Congress as it is in the Civil Service, in private business, or in the academic world. We know that it may have the bad effect of keeping an incapable man in office, and consigning a capable new-comer to continuous oblivion; and it may waste talents and dissipate enthusiasm.[3] Other factors considered in committee appointments are general political ability as evidenced by experience previous to election to Congress, political weight in the party, and, rather importantly for so large a country as the U.S.A. and one in which federalism is the very basis of the Constitution, geographical distribution. It is a general rule that no State shall have more than two places on a Committee. The Chairmanship is of particular importance, and it goes only to men long in the party counsels or of exceptional ability. And here seniority has a more vital justification than in the choice of the ordinary member. When allowance is made for the services of their own electoral fortunes and that of their party, chairmen have on the whole served for quite long terms.[4]

The Committees are the real legislative bodies of the House. They have been called the 'little legislatures' by the critic[5] who first startled the country with a realistic study of their activity. A famous Speaker, Thomas B. Reed, has called them 'the eye, the ear, the hand, and very often the brain of the House'.[6] The 'very often' has, since Reed's time, been changed into 'with inappreciable exceptions'.

All bills go to Committees, and this means the Standing Committees, since the Committee of the Whole is hardly used for non-financial bills, and even when it is, the business is previously reported upon by a Standing Committee. The Committees are inevitable stages[7] in the progress of the bill; and custom has converted them into the chief judges of the substance and forms of legislation. The President's sessional message is divided into its component parts and scattered among the Committees; all bills go to them; they have full power over bills committed to them 'except that they cannot change the title or subject'; but

[1] Cf. Chiu, p. 81. Figures from 1912 to 1928.
[2] Cf. Luce, *Congress*, p. 7.
[3] Ibid., p. 8.
[4] Alexander, op. cit., p. 229.
[5] Wilson, *Congressional Government*.
[6] *Parliamentary Rules*, p. 59.
[7] *Manual*, Sects. 439, 667.

amendment of a project may essentially change it. The Committee sorts the proposals which pour in; selects those of importance and with a chance of acceptance within the time-limit imposed by their term of office and the necessity of the Senate's consent. Those upon which the party in power insists, or recommended by the President when he and the majority are of the same party, get priority. The rest are left in the 'morgue' (otherwise known as the 'inactive list, or calendar')—the archives which harbour still-born projects; and this consignment is decisive. Long and ardent controversies against the old rule of unanimous consent for the forced reporting-out or 'discharge' of a bill, which placed despotic power in the hands of Committees and the Speaker, have resulted in some amelioration, but not much. For, in spite of the spokesman of the more independent groups within the great parties, the House manœuvred towards very onerous requirements: one Monday a month it may be moved that a bill be reported out in fifteen days: the motion must be seconded by *a majority of the membership of the House*, that is, 218 members. If this requirement is fulfilled, there is a forty-minute debate on the motion.[1] However, there are rarely as many as 200 members present on Mondays; and even when the motion is successful time cannot be found by the House to debate the reported bill. Legislation is, therefore, by permission of the Committees. Satistical examination of Congressional activities from 1901–21 show that not over one-fifth of the projects were ever considered in Committee, and not over one-eighth were ever reported, while under six per cent., or one-seventeenth, were enacted.[2] Of those which were reported out a steadily increasing percentage, to 91 per cent. in recent years, are acted upon by Congress.[3] In the House debates the Chairman or, if he is not in favour of the bill, the foremost member who is, has a right of recognition prior to all others in the House, and members of the Committee are prior to others. But the Committee has no such jurisdiction over amendments as have the French Commissions; nevertheless, the real power lies with the majority party's members of Committee, aided and guided by the party Floor Leader.

Since debate in the House is poorly attended and quite unreal, being but a formality punctuated by obstructionist tactics to secure amendments, the Committees are the only place in which the minority has the opportunity to voice its opinion, and sometimes to secure concessions to its claims. Hence, the minority party secures representation, which has varied from Congress to Congress according to

[1] The development of this system, with some interesting references to the issues involved, is traced in Chu, p. 258 ff.

[2] *Harvard Thesis on Committees in Modern Legislatures.* Cf. also Chu, p. 115, and the note on page 785, *supra.*

[3] Hasbrouck, p. 75.

its party composition. In 1928, for example, it was 15 to 11 on the Committee of Ways and Means.

Hearings. The most notable difference between the Congressional Committees and those of Continental Parliaments is that they may institute hearings in any place where their information is to be found, and they may open their 'hearings' to receive witnesses of all kinds, and as we have already shown in the analysis of the 'Lobby', the hearings do speedily attract people with an interest and with knowledge useful to the Committee. When the hearings are concluded the Committee proceeds to make its report. The minority has whatever chance of actual concessions the majority is prepared to give it. But it has an unrestricted right to expression and publication of its full opinion in the report.[1] Much more is, however, claimed for these Committees: that they cut across party lines in their judgement and drafting of bills, and that party rules less than economic and sectional constituencies. Only the revenue raising committee, the Committee of Ways and Means, and the Committee on Rules seriously divides according to party: here the minority is expected not to appear.[2] This, of course, is due to the uni-party nature of American politics.

The critics of the Congressional Committees point out the danger of unrepresentative government which follows from such an exertion of powers. It cannot be denied that the smaller the Committee the further away is one from the numerical conditions of representation. This argument is not properly countered by those who say that there may be representativeness even in a single person of ability. This cannot outweigh the certainty that a diminution of number is a necessary diminution of representativeness. It is true that a line must somewhere be drawn in the size of Committees and representative assemblies: too many will give results as bad as too few, for the institution is incapable of effective expression and registration of many voices. The sizes of the Committees vary between 35 (on appropriations) and 17 (on Irrigation and Reclamation). The American Committees are surely too small, especially when we remember the geographical and occupational diversity of the country, and the unrepresentative character of the parties. If, as is true, they are the real legislatures of America, then they ought to be more representative. They have already been compelled to admit non-Congressional witnesses into their preparatory deliberations.

Again, division into a large number of assemblies results in a loss of touch and harmony between the various strands of legislation.

There is general recognition, however, that, given the nature of American parties and the immense legislative activity of Congressmen (observe the terrific number of bills introduced), such a system is

[1] *Manual*, Sect. 730. [2] Luce, op. cit., p. 13.

indispensable. The way of progress, it is believed, lies in small improvements of technique. Already a very able observer has applauded the assiduity and ability of the Committees, and as to the importance of the Committees for the private member, it has been said, 'There is no insignificant member of Congress when it comes to votes in committee-rooms.' [1] Moreover, 'if a department or bureau is involved, its head or his representative usually comes upon request, and in that way there is maintained a much closer contact between the legislative and Executive branches than is commonly supposed'. [2] Indeed, some Congressional Committees habitually refer their bills to the appropriate Government departments for comment, which is not seldom highly effective: civil servants are called before the Committees, they have their drafting experts, the President and the Heads of Departments are in constant touch with the appropriate Committees, and they are permanent accumulators of letters and other communications from the public and the organized interests.

It might almost be said that the Congressional Committee offers, in this respect, one remedy for the unwholesome effects of the separation of powers, and how the Executive contrives to penetrate the legislature through the medium of the Committees is discussed in the section relating to the legislative leadership of the Executive.[3]

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We do not propose to say anything further regarding the legislative methods of modern parliaments. This, however, we can plainly see, that the procedure is far different from what is popularly supposed or even from the accounts usually given in treatises on government. To take one example only, the usual account of three readings is ridiculously inadequate. We have seen the embryo of machinery which permits quiet and consequential discussion, the admission of expertness, and the representation of interests. Secondly, we have observed how much really hard work must be contributed by the individual member if he wishes to participate in the making of decisions, and the unfortunate amount of absenteeism which actually exists. Thirdly, we noticed the extent to which the procedure of Parliament was directed to influencing the general body of the public rather than its members. We casually noticed, fourthly, the safeguard of minority rights. And, finally, we appreciated the managerial importance of party organization in the whole process.

FINANCIAL LEGISLATION

So far, however, we have concerned ourselves only with legislation on ordinary matters. There is still something to add in regard to legislation where finance is directly involved. Here let us enter one warning. Recent discussions in parliaments themselves have placed

[1] Luce, op cit., p. 14. [2] Ibid., p. 12. [3] See Chap. XXIII, *infra*.

more importance upon what is called 'financial' legislation, meaning the laws which directly vote supplies or affect taxation, than upon other laws. Yet it is clear that bills of the former character are only the logical consequence of ordinary bills which create services and institutions for which payment must be found. Consequently, there is no fundamental reason why these bills should be differentiated, since it often happens that ordinary legislation does, in fact, impose the burdens. However, in the historical evolution of parliamentarism procedure upon financial bills was conceived not simply as a method of securing economy, but also as a means of checking the power of Crown or Ministers, and of vesting in Parliament the power to stop the whole machinery of government should its will be thwarted.

The English system rests upon law, practice and the rules of the House of Commons,[1] and its foundations are: (1) that no one excepting the responsible Ministers of the Crown may originate a new charge or increase an existing one; (2) that the House will not grant money except the demands be initiated in Committee of the 'whole House'; (3) that these stages are complex, not simple; (4) that debates upon the regular annual financial legislation take place within a space of time allocated broadly but definitely by the Standing Orders; (5) that appropriations made by Parliament are specifically assigned to object and time; (6) that there is a retrospective survey of the legality and economy of the appropriated amounts. Let us consider these a little more closely.

(1) Around this revolves almost all the excellences and all the defects of financial procedure. The rule is the residual deposit of all the constitutional currents which, in the course of centuries, have transformed a monarchy into a virtual republic[2]: a compromise, which has retained the name of the Crown to support the independence of the Cabinet and to limit the chaotic results of parliamentary initiative, and at the same time has transferred to the popularly responsible Cabinet the real initiatory power. The Standing Orders of the House (Nos. 66 to 71B) embody this. Standing Order 66 reads: 'This house will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by parliament, unless recommended from the Crown.'

[1] Cf. May, Chap. 18; Durell, *Parliamentary Grants*; Willoughby, *Financial System of Great Britain*; Hilton Young, *System of National Finance*; Hills, *The Finance of Government*. For simplicity I omit the discussion of the Supplementary Votes and Votes on Account; also the distinction between Consolidated Fund and Supply Services. Nor do I enter into the question of the proportion of annually variable taxation to that which is more permanently settled. The general theory of Budgets is best treated in Jèze, *Cours de finances publiques: Le Budget* (1922); and, further, in other matters regarding public finances, in his *Cours*, 1929–1930. In English there is Bastable's *Public Finance*.

[2] Best described in Durell, Chap. 1.

Perhaps the most noteworthy feature of this arrangement is that it is pure usage and self-control upon the part of politicians: no external authority, no statute, ordinary or constitutional, imposes this rule of behaviour, which differentiates the English system from all others.

How is the rule implemented? The responsibility of asking for money is put upon the Government: it is the spender. It produces annually a complete set of proposals for expenditure, the Estimates, and proposals to cover the total sum by taxation, in the Budget, where the expenditure and revenue are balanced. Very complicated and important processes precede the Government's advent before the Commons. The Estimates begin to appear before the Commons in February preceding the 1st April which begins the year for which they have been calculated. They have undergone long gestation, and it is true to say that although the final battles and establishment have occurred in autumn and winter, they are the subject of a continuous all-the-year-round process of excogitation and arrangement with the Treasury, for they are far too involved, and too large and too disturbing, to be improvised: £800,000,000 per year, and twenty large and voracious departments!

If the ultimate net effect is to be that every penny is spent to the maximum social satisfaction, it is clear that a process of adjustment among the departments, and adaptation to economic circumstances and the relationship of political forces must occur. This implies three things: considered comparison of diverse claims for expenditure, considered relationship between the total of admitted claims and the total available resources, and thirdly, as an inevitable corollary in a day of highly complicated and extensive State activity and changing Ministers and Parliaments: a permanent organization to secure the first two desiderata. These three are provided by the institutions of review and control of the Estimates of the Spending Departments by the Treasury, with the Chancellor of the Exchequer at its head; by the Chancellor's power of censorship, with the Departments' ultimate appeal to the Cabinet; and by the Treasury, the department of finance.[1] Moreover, upon these is fixed, clearly and ultimately, the responsibility for financial soundness: for the House of Commons can only *directly* interfere to reduce, not increase, the estimates produced by the Government.

The great merit of the system is that one small body, homogeneous by party, and aided by one of the most efficient groups of officials in the world, can get as near as is humanly possible to a single mentality in which are comprehended all the various considerations for expenditure and taxation suggested by the members of the body. The system's principal defect is that it vests a special power, which may be and sometimes is used with unreasonable negative effect, regarding expenditure,

[1] Cf. Heath, *The Treasury*.

in the Chancellor of the Exchequer and his Treasury henchmen. As they have to find the money they will not take the risk of asking the country for more to spend lest they injure general trade prospects or become unpopular. Hence the Treasury microscopically scrutinizes the proposals to spend, asks for comparisons with those of several years back, and operates not on the principle that only new items require a special vindication, but that even the maintenance of the previous figure is not unchallengeable. Hence the especially important position held in all governments by the Chancellor of the Exchequer, and the rumours and echoes of storms between him and his colleagues, the disagreements and capitulations, the threats to resign, and even the resignations—all these are to be found in the biographies of Disraeli, Gladstone, Robert Lowe (Viscount Sherbrooke), Goschen, Sir William Harcourt, among others. When the department cannot come to an agreement on major matters with the Treasury, when this is carried to a struggle between Chancellor and Minister, the Cabinet decides. The psychological foundation of the system is the necessary and continuous tension between one man set to guard the treasure and a number of others whose electoral popularity, in our own day, depends upon how much they can get and spend: and its ultimate basis is the knowledge, instinctive and empirical, that every head of a department necessarily believes that there is nothing in the world so important, upon which expenditure is so desirable, nay indispensable, as the object of his stewardship; that, indeed, the world would be well lost were this but provided. Clearly restraint is essential: and it comes about by a counter-force which sets expenditure side by side with expenditure, and all expenditures combined in relation to the fragile and complex sources and mechanisms of the production of wealth. Hence Treasury 'control', and the Treasury 'attitude'.[1]

(2) It is a practice of the Constitution that financial legislation originates in the House of Commons, and, further, it is a settled observance to resolve upon grants of money and impositions of taxes only in Committee of the Whole House. The House tried the experiment of sending estimates to a Standing Committee by rules adopted in 1919, but the practice was dropped after one session, because there was a general feeling that the subject was too important to devolve to a Committee. The proceedings in Committee of the Whole House possess three qualities, which may be considered merits or defects, according to the angle from which they are viewed: the House has slightly easier rules of debate, the whole House is formally in charge of such vital matters as grants of money, and the necessary resolutions that the Speaker leave the Chair, give the opportunity for general debates on governmental policy. The most important characteristic of English procedure at this stage is that it does not

[1] Cf. Machinery of Government Committee, Cd. 9230; 1918.

entrust the estimates or the tax proposals to Standing Committees like the legislatures of France, Germany, the U.S.A. and other important countries, but insists on their consideration by the whole House; and, secondly, that owing to the English party system and the existing body of tradition, the Government as a whole, the various Ministers during discussion of the Estimates and the Chancellor at the tax-proposal stage, are in charge of the House, and are, invariably, its masters: there is no one strong enough to compete with them, neither an independent Parliamentary Commission of Finances as in France or Germany, nor the members considered individually. The House, organized as the Committee of Supply, discusses the individual Estimates, votes a sum of money 'not exceeding' so many pounds, and this is afterwards converted in the ordinary procedure of the House into a vote. All the votes together are gathered annually into the Appropriation Act. The Committee of Ways and Means comes into existence about the same time, but a little later, to give effect to these grants by authorizing the Government actually to spend the money granted and to designate and provide it with the sources of revenue. Thus there is a dual control by the House, and its work is summed up in the Finance Act which includes the annual taxes and the changes in the permanent ones, and the Appropriation Act which enacts the grants, authorizes the expenditure, and assigns the money required to each item.

(3) and (4) What are the main features of this process? It is clear that if the Estimates were left to the tender mercies of the Opposition the House might never cease debating them, and, indeed, until 1902, the arrangements obstructed rather than facilitated the work of the House. Since 1902, not more than twenty days are allotted to Supply (before 5th August), though an extra three days may be added. Secondly, the House sees the Estimates only very shortly before the day of discussion. Thirdly, the House may vote a decrease of the estimate but not an increase, though it may 'suggest' extra expenditure. The consequences for the individual members of the House are serious: members can do no more than enter upon a general, scrappy and rather vague discussion of the Government's proposals. To offer to decrease an estimate is tantamount to a vote of no confidence, and is, indeed, the formal resolution upon which discussion turns: it cannot be carried, and therefore the discussion loses its sting. To offer the increase of an estimate might be desirable, but is legally impossible, and perhaps, on the whole, it is best here that the Government should have considerable independence. Next, the members are incapable of any significant control of the Estimates, owing to the shortness of time available for their examination and also the form in which they are couched Even if the Estimates were put into a clearer form, they are so voluminous, and each item represents

a so highly technical set of circumstances and inwardly technical relationship with all other items, that the discovery of the true connexion between the figures stated and the real nature of the values represented would demand years of application and expert tuition. But only days are available, and of them, but a few.

The more sensitive members of the House have sought to save themselves from this enforced impotence by the creation of a Committee or Committees on the Estimates, which would act as an examining body for the House and report to it. As far back as 1888 such a device was adopted, but with small effect: in 1903 a Select Committee was appointed to discover whether the House could 'more effectively make an examination, not involving criticisms of policy, into the details of national expenditure'.[1] It recommended an Estimates Committee to examine, at least, one class of the Estimates, before they appeared before Parliament. Nothing was done until 1912, from a sense of the difficulties inherent in the situation. These difficulties are: *the possibility of obscuring ministerial responsibility if the Committee is given any real latitude*, the terrific burden on the Chancellor or his deputies if the Government is to dominate the Committee, the large body of experts which must appear before the Committee if the members are to be coached in the subject-matter deserving inquiry, the length of time required for effective examination. It must be remembered that an important principle of public budgeting is that the Estimates should be made as late as possible since the risks of miscalculation increase with the length of the period for which they are forecast. However, in 1912, 1913 and 1914, a Standing Committee on Estimates was set up, but to secure the undivided responsibility of the Cabinet the Estimates went to it only *after* presentation to the House. Therefore, its reports came late, sometimes in July, and the results were insignificant. Further, it was sadly hampered by lack of expert advice, and as a later Committee said: 'Its inquiries, necessarily, were to a great extent haphazard. The annual estimates cover the whole sphere of national government: they enter into minute detail; to comprehend them fully is a science in itself.'[2] In 1918 a Select Committee on National Expenditure once more recommended Standing Committees on the Estimates: two, with perhaps a third, for the former single committee had found it impossible to deal with more than a minute portion of the Estimates. It declared it possible to separate policy, which must not be touched by the Estimates Committees, from 'desirable economies upon which it would report to the House'. Then, to assist it to escape from the futility of previous Committees, it should receive the aid of a special officer of the House, the 'Examiner of Estimates', 'to collect from

[1] Cf. Report, Select Committee on National Expenditure, No. 242 of 1903.
[2] Cf. Ninth Report, Select Committee on National Expenditure, No. 121 of 1918

his own study of the estimates, from information obtained officially or semi-officially, from communications received from members of the House or from the public, facts which would indicate to the Estimates Committee useful lines of inquiry'. Neither the Treasury nor the Comptroller and Auditor-General could, for obvious reasons, perform the service. Further, to give vitality and meaning to the Committee the House must select the votes which it wished to discuss from among those reported on by the Committees or those which were to be deliberately passed over, and the Committees should have the right to get their reports debated to a limit of two days in the session. Further, the Government must give up its practice of regarding as a censure every adverse vote however unimportant: in other words, it must be prepared to make concessions: 'Only when the House of Commons is free, not merely in theory and under the forms of the Constitution, but in fact and in custom, to vote, when the occasion requires, upon the strict merits of proposed economies, uncomplicated by any wider issue, will its control over the national expenditure become a reality.'[1]

A Select Committee on Estimates was established in 1920. It consists of twenty-eight members, may work through subcommittees, and examine any Estimates presented to the House and report 'economies consistent with the policy implied in those Estimates'. Though its work has been useful, it still suffers from certain natural results of the parliamentary-Cabinet system. It has not the time, even superficially, to examine more than two or three Departments each year: therefore it can only be of small use to the House, and only of occasional effect in frightening a department into economy. It still labours without expert aid, and consequently sometimes makes recommendations which omit elementary facts. It cannot secure settled days for the discussion of its reports, and this for an important reason we have already observed; the discussions on the Estimates have developed into general discussions on policy and the Opposition has in this one of its all-too-rare opportunities of criticism and the courtesy of Parliament has given the Opposition leaders the privilege of choosing the subject of discussion. Are these to be limited?[2]

Thus Parliament is still largely undirected and incapable in financial legislation. Nor is it helped by the form of the Estimates. Until 1927, indeed, the Votes were put together without any uniform principle; the subject-matter of the Vote was the original principle, but this was not always followed when innovations were made. In 1926 the Select Committee on Estimates recommended a grouping into a number of services,[3] each containing the appropriate de-

[1] Cf. Ninth Report, Select Committee on National Expenditure, No 121 of 1918, p. 6.
[2] Cf. Marriott, *Mechanism of the Modern State*, I, 546, 547
[3] Cf First and Second Reports from the Select Committee on Estimates, Nos. 59, 119 of 1926.

partments, and that services done for the departments by others, should appear as a footnote. This was adopted, and has promoted clarity. Yet other proposals such as those of Sir Charles Harris of the War Office, to produce estimates of units of cost in the various departments, say a horse, a lorry driver, etc., and thereby render comparison, and therefore understanding and criticism, easy, have only a very limited application, since, in the first place, units are not so easily discoverable, and when so, they are only formally the same, for it is the vast hinterland of many subtle, but concrete differences, that makes the difficulty of financial control. *The plain truth is that Members of the House of Commons lack the two things which would give them control: time, and a great deal of it, and expert knowledge of the details of administration as well as financial insight.* The Treasury has both of these, as it is permanent and professional. The time of the House can only be increased by reforms such as those discussed later, and principally by the multiplication of Committees. Its expertness may be increased, but only to the point of spurring and curbing the administration, and even this very weakly. The amount of time available in Supply for discussion of the Estimates has certain necessary results: discussion must be superficial, it can only touch upon a fraction of the total estimates while others are simply accepted in the division lobby without a single word of discussion.[1] Debate has, of course, become merely a general challenge of the main policy pursued by the Government, and the Government's general answer thereto. We may conclude this part of the description by an excerpt from the Report of the Select Committee of 1918:

'But a so-called Committee of 670 (*now 615*) members cannot effectively consider the details of finance. The time at its disposal is closely restricted. It cannot examine witnesses. It has no information before it but the bulky volumes of the estimates themselves, the answers of a Minister to questions addressed to him in debate, and such facts as some private member may happen to be in a position to impart. A body so large, so limited in its time, so ill-equipped for inquiry, would be a very imperfect instrument for the control of expenditure even if the discussions in Committee of Supply were devoted entirely to that end. But those discussions afford the chief, sometimes the only, opportunity in the course of the year for the debate of grievances and of many questions of policy. In the competition for time, those matters, of greater interest and often of greater importance, usually take precedence, and questions of finance are crowded out. And even if all these obstacles are overcome, and some rare occasion arises on which the House of Commons discovers and debates a case where a reduction in an estimate appears desirable, and would be disposed to insist upon its view, the present practice, which regards almost every vote of the House as a vote, not only on the merits of the question, but for or against the Government of the day, renders independence of action impos-

[1] *E.g.* in 1905, £50,619,241; 1911, £67,046,752; 1925, £215,285,887; 1928, £214,266,109.

sible. Under these conditions it is not surprising that there has not been a single instance in the last twenty-five years when the House of Commons, by its own direct action, has reduced, on financial grounds, any estimate submitted to it.' [1]

This means that the Treasury is the only real controller of economy in government: government, a vast apparatus employing 400,000 people and spending £800,000,000 per year.

(5) The acts we have mentioned do not compel the Government to spend the money granted, that is merely their maximum. But any unspent balances cannot be used at the discretion of the department which has received the grant, but is returned to the Exchequer. This *annuality* secures the control of the Commons if it should ever be in a situation where such a drastic control were necessary. Further, since 1689 there has developed with more and more minuteness, the principle of the *speciality* of appropriations.[2] The Estimates appear in a detailed classification of Classes, Votes and Sub-heads and, except under conditions, this classification regulates upon what things the department may legally spend. Yet, what if calculation could not exactly estimate the amounts required in each unit? may there not be a diversion of funds from one to the other? Such a course is dangerous, as it may open the way, if uncontrolled, to a flouting of Parliament. Diversion, or virement, as it is technically called, is permitted on conditions. In the case of Votes for Civil Estimates no virement between them is at all possible; in that of the Army and Navy the Appropriation Act annually lays down conditions of virement between Votes with the sanction of the Treasury.[3] As regards sub-heads, these are purely informatory and the House resolves only the Votes. The departments are therefore free to divert from one sub-head to another, but to avoid undue liberties and the mystification of Parliament, Treasury sanction must be obtained, and the Treasury acts strictly, sanctioning only allied sub-heads in the case of the Civil Estimates.

(6) The control of the Executive, and to some extent even of the Treasury, is served by two institutions, the office of Comptroller and Auditor-General and the Public Accounts Committee.

The Comptroller and Auditor-General, whose office was created by the Exchequer and Audit Act of 1866, serves two functions: the control of monies from the Consolidated Fund and the audit of accounts. Pursuing the first function the Comptroller permits issues to the Treasury (which then permits the money to pass to the Paymaster-General and thence to State creditors), only after review of the authority for such issue, and this is a power, which not altogether, but almost so, prevents the misapplication of money. Pursuing the second function he audits the accounts of issues made yearly, certifies

[1] Report, 3. [2] Cf. Willoughby. [3] Durell, 283 ff.

the accounts and reports to Parliament. He is concerned with the proofs of payment and with the proper expenditure of the money. Further, the Comptroller not only reports upon legality but upon the wisdom and economy of expenditure, that is, he is concerned with waste in so far as it is to be detected:

'I do not feel myself debarred from calling attention to anything which has occurred in the course of my audit during the year which indicates loss or waste, or anything of that kind, which I think it is well that Parliament should know . . . if I find the result of administrative action has been a loss or wastefulness of public money, then I think it is not going beyond my duty of reporting, as an officer of the House of Commons, if I call specific attention to matters of that kind, even though the account itself would not disclose the facts. . . .'[1]

In other words, within the Executive system itself, Parliament has placed a permanent executive officer with the task of controlling the executive elements engaged in spending: it has provided for an officer as continuous, and as professionally interested in legality and economy, as they are in spending. His legal status is of the essence of his utility. He is appointed by the Crown, during good behaviour, is removable only on a joint address of both Houses of Parliament. His salary is a charge, like that of judges, on the Consolidated Fund. He reports to Parliament. In short, he is, in reality though not formally, a servant of Parliament, to control the Executive; and he has a position independent of the Executive whom he is to control, even of the Treasury. His reports are of the greatest importance, for they, by anticipation, prevent illegality, and, retrospectively, discover illegality, and criticise wastefulness. Nor is this all: the Comptroller is aided by, and in turn aids, a special organ of the House, the Committee on Public Accounts.

It is clear that Parliamentary control is imperfect unless it receives the report of the audit of public accounts, and more, unless it proceeds to an examination thereof. Until 1861 such examination was spasmodic and badly organized.[2] Since 1861 a Committee on Public Accounts has been set up every session 'for the examination of the accounts showing the appropriation of the sums granted by parliament to meet the public expenditure'. When the Comptroller and Auditor-General was established, the circle of financial control was complete.

The Committee's composition is important. It consists of fifteen members; its chairman is a member of the Opposition, sometimes a former Financial Secretary to the Treasury, and the rest of the members are distributed according to the party composition of the House. It examines the reports of the Comptroller, who personally helps it, and Treasury officials are also present. It may, and does, call for department accounting officers and whatever information it finds appropriate. Thus it is enabled to penetrate the financial and administrative

[1] Report 1903, Question 756.

[2] Cf. Durell, Chap. III.

fastnesses which are closed to the amateur. Its investigations, as any one of its reports will show, are very thorough. Finally, it reports to Parliament, which sometimes discusses the reports. Far more important than parliamentary discussion, even on its rare occasions, are the Treasury Minutes which embody the chief reformative findings of the Committee and go, like barbed arrows, to the culpable departments.[1] Now it is true that the Committee acts not only retrospectively, but late: for the Comptroller's reports do not reach Parliament until one year after the expenditure has been incurred, and only about a year after this can the Committee report. However, departments do not like the smart of public censure, or Treasury reprimands. When matters are indefensible, the pecuniary responsibility of one or other official may be involved, for in extreme cases the Committee may recommend disallowance. The Treasury itself may be challenged for permissions or prohibitions for which it is responsible.

'There is', said one chairman of the committee, 'a great deal of human nature in the world, and fear is one of the greatest helps in keeping men straight. The fear of the Public Account Committee, and the very searching examination that takes place there, does a great deal to help in the path of rectitude the members of the civil service.'[2]

On the whole, then, in England the Cabinet is mistress of finance, it is indubitably responsible for it, while the Chancellor is, above all, the controller of expense; and the House of Commons has lost any control between the almost impossible margin of overthrowing the Government on policy, and tinkering with small economies, in the main, retrospectively. Arrangements to reinforce the power of the House of Commons are dependent for their efficiency upon more time and expertness of its individual members, and should they go far would damage the independent expert economy of the Treasury (which is of the highest value), and the power of control and responsibility the concentration of which in the Cabinet is the best guarantee of the maximum economy.

Other countries seek the main principles which underlie the English system: clarity of the Budget, considered discussion, responsibility of a single authority for proposals of expenditure, but for various reasons have hardly attained it.

Germany has come closest to English practice. Her procedure is now regulated by Articles 85 to 87 of the Constitution and the Reich Budget Order (*Reichshaushaltsordnung*) of December, 1922, a law passed with the majority required for constitutional amendments, and again amended in March, 1930.[3] These are the principal legal disposi-

[1] Cf. the interesting Treasury document called *Epitome of the Reports from the Public Accounts Committee*, 1857–1925 (1927, No. 161).

[2] *Hansard*, 5th Series, XXXVII, 424.

[3] Cf. Schulze Wagner, *Die Reichshaushaltsordnung*, Second Edition, with Appendix on reforms of 1930; Kuhnemann, *Haushaltsrecht und Reichsetat* (1930).

tions concerning the Budget and the examination of accounts, but the rules of procedure of the Reichstag and the Reichsrat are also of importance, since they establish Standing Committees to deal with proposals for expenditure and taxation. The net effect is to secure the completeness, the unity, the clarity and good faith, the speciality of appropriation, of the annual Budget, and its *previous* acceptance by Parliament. Upon certain things doctrine, rather than law, has its uncertain word, as in England; in particular, in the thesis that the money voted by Parliament is a maximum, that, according to the principles of sound public finance, this is not a command to the Government to spend, but only a permission, and the Government shall spend only as economy requires. Both academic and parliamentary controversy revolves around this.[1] Further, the principle of economy, which in England is not legally stated, but is in practice applied by the Treasury, is definitely stated in Article 17 of the Budget Order: 'Only such expenditures may appear in the Budget *as are necessary* for the maintenance of Reich administration or the fulfilment of the duties and legal obligations of the Reich', and further, Article 26, declares, 'appropriations (*Haushaltsmittel*) are to be administered efficiently and economically (*wirtschaftlich und sparsam*)'. These clauses, in fact, have been submitted as the written foundation for the doctrine that the Government need not spend the appropriations.

To secure economy, the law gives the Minister of Finance special rights and obligations which were hitherto vested in him by convention. A Cabinet Resolution of October, 1923, requires that he be consulted by his colleagues whenever projected statutes or administrative measures have financial consequences, gives him the right to send inspectors into the departments and require reforms, -all, of course, with the right of appeal to the Cabinet. Article 21 of the Order and Article 32 of the Rules of Procedure of the Cabinet give the Minister of Finance a legal priority over other Ministers, and probably they have formulated what in fact occurs in England.

'Expenditure and observations whose acceptance in the Budget the Minister of Finance has rejected, are subject to the vote of the Cabinet upon the motion of the competent Minister, only, however, if matters of principle or otherwise appreciable importance are concerned. . . . If the Cabinet votes against the vote of the Minister of Finance to exclude an appropriation or observation, then the Minister of Finance has a right of protest. The appropriation or observation can then only be put into the Budget if this is resolved in a further vote by a majority, and *when the Prime Minister votes with the majority*.'

This, of course, is entirely subject to the combination of parties in the Cabinet: and when the Finance Minister belongs to a tactically

[1] *Cf. Kühnemann*, 19.

weak Group his formal supremacy is as nothing, and, in fact, the Ministership of Finance goes to the Prime Minister's Party or to an expert from outside Parliament.

The parliamentary stage differs most from English procedure. The Government approaches the Reichsrat first, and this has full powers of amendment and rejection.[1] In the Reichstag there are three readings,[2] the first reading being the great demonstration like the English Budget speech. Only the principles are discussed, however, and then the bill goes at once to a Standing Committee (No. 5) on the Budget, called the Chief Committee. It consists of thirty-five members, corresponding to the party strength in the House. This is the principal stage of money bills. The Estimates are here discussed for months, with the appropriate Ministers, officials, economy experts. All the necessary documentation, library facilities, secretarial aid are available; and for specially difficult and involved questions a permanent subcommittee is employed The second reading is a discussion on the Committee's series of reports; the third goes over the ground again, beginning with a general discussion. There are no criticisms on the work of the Committee: Ministers are in command and are responsible, and certainly with a Group system and an unrestricted right of financial initiative on the part of private members, chaos would follow any freedom in the Full House. The great obstacle to parliamentary control of financial policy in England is absent in Germany: the convention that the Government alone is responsible for it. There is theoretical controversy over the right of Parliament to initiate increased charges, but there is more about its right to increase or decrease expenditure The second reading in the full House is considered a waste of time, and it prevents a speedier voting of the Budget without any compensating benefit. The right to initiate or raise expenditure is also censured, and the English rules regarding this have been praised in the Reichstag,[3] for as the rules of the Reichstag now stand,[4] amendments can be moved on the second and third reading without previous examination by the Committee of the Budget. But Germany, like France, suffers ultimately not from defective rules but from an anarchical party system. Though, in Germany, this anarchy is not so old as in France, its fruits have already been such obstruction to the annual financial legislation as to produce emergency decrees and a dissolution of the Reichstag, and public shame has had to accomplish what public spirit was first too weak to do.

French financial procedure has long been a byword among the

[1] Cf Chap X, *supra* [2] G.O. 36

[3] Moldenhauer, Minister of Finances, Reichstag, 26 May 1930. Cf. also Dorn, *Bericht des deutschen Juristentags*, Salzburg, 1928.

[4] G.O. 41–6.

connoisseurs of parliamentary pathology,[1] although French theory is of remarkable excellence and clarity, and here again the rules are better than the spirit in which politics are conducted. As we have seen, the two vital points around which sound procedure revolves are the independence of the Minister of Finances and the self-control of Parliament. In both these things France is defective in spite of recent improvements in the rules regarding the latter, which we will consider first. The long struggle between Parliament and Executive in the nineteenth century naturally impelled the deputies to demand complete parliamentary freedom of disposition in financial matters: to raise and to lower appropriations and taxation, to amend or reject the Budget, to tack all sorts of general reforms to financial grants, to discuss the projects without limitation or coherence, and to attach interpellations to the financial resolutions. This led to intolerable abuses: the humiliation of the Government, the voting of uneconomical supplies to impress the country and win the support of organized groups, the retardation of the annual votes, the destruction of a single responsible authority.

In 1911 and 1920 important reform of the rules of procedure occurred. (Note that in both these years there was a strong majority on the side of reform and in both years, also, national and international difficulties compelled reform.) In 1911 [2] it was forbidden to attach interpellations to the discussion of the Budget, and additions to expenditure could henceforth be debated only after report by the Commission of the Budget, and a time-limit was set to speeches. This had little effect. The trouble was more deeply seated. Hence the reforms of 1920.[3] In regard to the Finance Law no amendment or additional article tending to augment expenditure may be put after the three sittings which follow the distribution of the Commission's report in which the relevant chapter appears. No augmentation or diminution of expenditure can be proposed simply to raise a debate on ministerial policy (*à titre d'indication*). This has been a notorious vehicle for parliamentary exhibitionism as well as the occasion for *bona fide* but untimely debates on administration. When an amendment or additional article falls within the competence of one of the Permanent Commissions and is endorsed by at least fifty signatures, it is sent to this Commission if the Commission of the Budget or the Government requires it. This is in order to secure at least some expert discussion on the matter before the Chamber debates the matter, and even to get impertinent demands postponed or settled. No proposition tending either to augment salaries, indemnities, or pensions, or to the creation of services, employments or pensions, or to their extension outside the limits of

[1] Cf. Jèze, op. cit., Allix, *Science des Finances*; Girault, *Cours de finances publiques*, and for a popular exposition, Bonnet, *Les Finances de la France* (1924).

[2] *Résolution*, Art. 1, 2 and 3. [3] Cf. *Règlement*, Art. 101 and 102.

the law already in force, can be made in the form of an amendment or article additional to the Finance Law. The discussion of the Budget cannot be interrupted by certain resolutions. Outside these restrictions, of course, the Deputies can initiate increases of expenditure and taxation: in the House of Commons the prohibition is, for private members, absolute.

The principal abuses are remedied, but there is no such allocation of time as in England, only simple closure, so that the Government is browbeaten and delayed long past even a reasonable period after the beginning of the new financial year. Yet this is not all: for owing to the fragmentation and conceit of the Groups, the synthetic and quaking majority which supports the Cabinet, the Minister of Finances is in normal times not able to implement the rules which give him authority over the estimates of his colleagues, for they may soon break away from his dictates and even from the vote of the Cabinet, and actually do battle with him before the Chamber and its Commission of the Budget. But a Commission of the Budget as it operates in France may enhance the weakness of the Minister of Finances and encourage the Deputies to tergiversate.

Let us consider the organization and functions of the Commission of the Budget of the Chamber of Deputies. Since 1920 all financial matters are concentrated in one Commission, that of *Finances*. It consists of 44 members (the Senate's, of 36), it divides itself into subcommittees corresponding to each Department, and these have special *rapporteurs* under the superintendence of the *rapporteur-général* of the Commission. All the Estimates come before it, all the taxation proposals, it advises all the other Commissions of the Chamber where their work touches finance, its connexion with the Ministry of Finance is continuous, giving advice and sometimes admonition, and receiving the information it wants. It has an adequate secretariat and general equipment, meets almost every day, and assumes the position of the authority responsible for the finance of the country. In these matters all depends upon the spirit which animates the body. The Commission is not so much the competitor of the Minister in ordinary times: it is his master. He can do nothing unless he convinces it. Now it may, and frequently does, happen that while the party composition of the Commission remains constant, that of the Cabinet has altered. The Commission is in a position to force upon the Cabinet its proposals or its friend. Moreover, the Deputies have no reserve in wishing and securing the overturn of a Ministry, even for rather personal ends. They are, then, the masters of finance, and the *rapporteur-général* is a very important person, who if we follow actual experience (in the case, for example, of the deceased M. Bokanowski), appears before the Chamber proud of *his* Budget, determined to support the view of the Commission, dealing freely with policy, and enters upon those cal-

culations of national wealth and taxable capacity and needs for expenditure, which in England are associated only with the Treasury and the Cabinet. In 1925 it virtually dismissed M. Loucheur, not content with his taxation proposals, and so dealt with his successor, M. Doumer, that the Cabinet staggered, only to fall a few months later.[1] In 1926 it directly heard representatives from the Revenue Service regarding evasion of taxes.[2] In the experiments of Caillaux and Poincaré in 1925 and 1926 the Presidents of the Commissions of both Chambers played a critical and masterful part, even in the remaking of the Cabinet. The President and the *rapporteur* usually find their way into the Cabinet in the course of time. Although, then, the Commission does most useful work, it encourages the anarchy of the Chamber, takes responsibility from the Minister of Finances, without being able to assume it itself. A great national campaign, like Poincaré's in 1926, is needed to overcome the general chaos. Yet at the root is the chronic evil of party divisions and personal ambition.

Both in France and in Germany there are Courts of Accounts (*Cours des comptes*,[3] *Rechnungshof*[4]) composed of independent officials to examine and report upon expenditure, both as to the legality and the wisdom of expenditure. The German Court is based on Article 86 of the Constitution and Articles 87 to 126 of the Budget Order. It is independent of the Government, and takes orders from no other authority in the Empire: it is empowered and obliged by the law only. That is, it is in a judicial position. The power of appointment of its President, deputies, directors and counsellors is vested in the Reich President with counter-signature of the Minister of Finance. They must have the prescribed qualifications for judgeship, or higher administrative or technical service: at least one-third of them must have judicial qualifications. They have the guarantees of office accorded to judges of the Supreme Court. They report not only upon the legality of expenditure, but on the economy of financial transactions of all kinds, and whether institutions and places have been maintained, or expenses incurred, which could have been retrenched and have served without jeopardy to the administrative object.

We turn to a system vastly different from this, because based upon the principle of the separation of the legislative and the executive powers—the American budget system.[5] Until 1921 the U.S.A. had

[1] Cf. *Revue politique et parlementaire*, 1926; *Revue du droit public*, 1926, p. 451 ff.
[2] Cf. Mer, *Le Syndicalisme des fonctionnaires*, 1929.
[3] Cf. Allix, op. cit. [4] Schulze and Wagner's *Commentary*.
[5] For the situation before 1921 see Willoughby, *The Problem of a National Budget* (1918); for a separate account of the reform movement cf. Weber, *Organized Efforts for the Improvement of the Methods of Administration* (1919); and Cleveland and Buck, *The Budget and Responsible Government* (1920); on the new system see Willoughby, *The National Budget System*, 1927, which contains a good bibliography; Buck, *Public Budgeting*; Dawes, *First Year of the Budget of the United States* (Dawes

all the elements which go to a sound budget system without that combination of them which alone assures its essential character: the considered, informed and integrated responsibility of the Executive, with parliamentary criticism and the ultimate power to reject outrageous demands. For the Executive had no right to appear on the Floor of Congress, it was not responsible to Congress, it was not a part of Congress, and the law-making power lay not with the President and his Cabinet, but with the representative assembly.

As with ordinary legislation so with finance: Congress had to provide its own agencies of leadership. True, the Secretary of the Treasury collected the Estimates, but when they were compiled into a book and transmitted to Congress, his work was complete. There was no preliminary adjustment of the appropriations in terms of their comparative urgency or relationship to predicted revenues. The heads of departments were in competition, and in fact addressed and bargained with Congress individually, and since there was not that fruitful service of the Treasury as in England, Congress could only require control of administrative finance by detailed itemization, which, without the faculty of virement, caused uneconomical practices. Two results inevitably followed: over-estimation of expenditure as a general prelude to bargaining with Congress, and frequent deficiencies which produced demands for supplementary grants. There was no budgetary message, no general explanation, no general debate, no considered balance sheet. Revenue proposals were considered in one committee, the Committee of Ways and Means; appropriations were considered unrelatedly, not in a general Appropriation or Supply Committee, but by nine different committees of the House concerned with the *subjects* of the expenditure, each service, in most cases, being considered partly by one committee and partly by another, the whole being summed up in thirteen separate appropriation acts without any organic connexion. The results, given the American Congressman's tenderness for appropriations for his own district or State and his slackness of responsibility, were deplorable: waste was on a gigantic scale, the departments were treated on different terms, and the only thing which permitted the system to continue without disaster was the enormous revenue which flowed in from tariff duties, and which provided, usually, a surplus.

Movement for reform culminated in the exceptional energy of President Taft, who intervened, as no previous President had intervened, to secure some organic relativity between the various estimates, and established a Commission on Efficiency and Economy (succeeded by a permanent Institute of Government Research) whose work and

was first Director of the Bureau of the Budget), and Government Reports: *Annual Report of Secretary of the Treasury*; *Addresses to the Business Organization of Government* and Annual Report of *Director of the Bureau of the Budget*.

reports led slowly but surely up to the important changes produced by the Act of 1921. Only the aftermath of the War, with its enormous expenditures and debts, and the social expenditure demanded by a new generation, added the dynamic force to the intellectual considerations presented by reformers.

The Budget and Accounting Act of 1921 establishes the following system. It vests in the President the transmission to Congress of the 'Budget', which sets forth in summary and detail the estimates of expenditure 'necessary in his judgement' for the year; his estimates of receipts; statistical information and balances regarding the finance of past years and the ensuing year, and other informatory data. He recommends action to make good predicted deficiencies and surpluses. In short, there is concentrated in the President the centralized consideration and recommendation of public finance. More, all other *executive* intervention is excluded, by the injunction that no officer or employee of any department shall submit to Congress or its committees estimates, requests or recommendations regarding appropriations or revenues.

To assist the President and to do the preparatory work for him a special service, the Bureau of the Budget, is created in the Treasury Department. Its Director and Assistant Director are appointed by the President, and the Bureau operates under rules presented by him. This is the workshop of the Budget system: but it has no force over the Departments: it is an investigating and collating authority, in the first place, the authority over the Departments resides in and emanates from the President. But in regard to its own powers the President enforces by rules the access of the Bureau to the departmental information it wants. Each department is obliged to appoint a special budget officer who prepares the departmental estimates. The Bureau aids and informs Congress as it requests. All, then, on the executive side depends upon the energy and capacity of the Bureau, and very much upon its Director, and upon the character of the President. Together they can approach the British or German system in efficiency: together they can cause the whole system to fall into weakness and contempt. The cohesion does not derive, as it does in the British system, from united responsibility to the Commons and the people: it is much more indirect than that, and hence requires an adventitious, independent probity. Hence there have come into existence certain extra-legal agencies for whipping up the necessary spirit to make the arrangement work well: in the localities governmental officers have formed business associations for consultation and general amiability and mutual stimulation in the good task, in Washington there is the 'Business Organization of the Government' which consists of the upper element of the administration, including the President and the Cabinet. Meeting twice a year, this

organization is addressed by the President and the Director of the Bureau of the Budget. These addresses are very inspiring; for in a system which still leaves Congress free to do as it wishes, it has been found extraordinarily difficult to stop officials who appear before its Committees from proceeding from explanation of the estimates to suggestions for their increase, in spite of the legal prohibition. Their friends in Congress and the newspaper world are enlisted in such marauding adventures. Moreover, officials have to be ordered not to urge new legislation on Congress calculated to cause new or increased appropriations without the President's approval. Decidedly, it is difficult to create a team-spirit.

How far has Congress re-equipped itself in the spirit of these changes? The whole work of appropriation has been concentrated in a single committee, the Committee on Appropriations of thirty-five members. This could not be combined with the Committee on Ways and Means, which would be the ideal arrangement, because Congressmen thought that this would place too much strength in a single committee. Hence revenue is still considered apart from expenditure. The Committee on Appropriations operates through ten subcommittees of five members each—each subcommittee deals with one or more departments of Government. The subcommittees conduct full hearings of the head of the department and his principal assistants, probing into all detail, and the evidence is reported promptly for the benefit of Congress—as many as 15,000 pages being issued in the aggregate. The subcommittees then draft a bill embodying their policy for the consideration and action of the full committee. The bills then pass into the Committee of the Whole House, which, in the English tradition, is required by the rules. The chairmen of the subcommittees drive the relevant appropriation bills through the strictly closured and rather futile proceedings in which members receive five minutes each. The second and third readings are mere demonstrations. In the Senate there is a Committee on Appropriations of eighteen members: it divides itself similarly to its counterpart in the House, and the proceedings are the same but less thorough. Whereas in the House amendments raising appropriations are in order without difficulty, in the Senate the suggestion must be approved first by the ordinary relevant Committee concerned with its general subject-matter. The two Houses confer, and ultimately agree They may have made many additions or subtractions distasteful to the President, the Director of the Bureau of the Budget or the heads of departments—these have no legal power over Congress, and only a very indirect and frail political influence. The President can veto not a single item, but only the whole of the bill. We have already observed that the Committees act with small partisan division, and this is true of the Committee on Appropriations—an extraordinary

arrangement when compared with England and Germany, and even France.

The essential difficulty of the American financial procedure still remains, in spite of the highly beneficial results of the new system. Congress may do as it likes with the Presidential proposals, for they are no more. The Committees and the two Houses may at any stage play ducks and drakes with the nicely balanced budget. In fact, the Committee on Appropriations has adopted the practice of not increasing, though they may decrease, appropriations—and in every year the Committee has granted less than the President asked for. The House slightly increases the amount reported. The Senate usually increases this slightly, owing perhaps to the large power generally possessed by individual Senators and their mutual good offices. The amount is decreased in conference. The net difference between the Presidential suggestions and Congressional grants are about one-half of one per cent. Thus Congress has subjected itself to considerable self-restraint, the first commandment of parliamentary efficiency. The question still remains: whether the enthusiasm of the creative period will survive into the long years when this may be replaced by the temptations to independence and extravagance. But neither Cabinets nor Presidents nor Treasuries nor Parliaments are invariably economical or extravagant, and we have seen that in England the interests of economy have caused the creation of parliamentary Committees on Estimates and Public Accounts.

Until 1921 Congress lacked not the power, but the organization, to assure itself of the due compliance of the Executive with its authorized expenditures. Further, the audit arrangements were defective. The Budget and Accounting Act created a General Accounting Office to which were accorded the two things which the old Comptrollership of the Treasury lacked, independence of the Executive and power to report not only upon the legality of financial operations, but to report to Congress mismanagement or inefficiency and to recommend improvements. Further, Committees of Congress may call upon the Comptroller for assistance.

Thus, the necessity for intimate acquaintance with the process of everyday administration and for the concentration and conspicuousness of responsibility for policy limits the power of Parliaments and places it in the Executive, and certainly divests the ordinary member of any opportunity of effective contribution, giving it ever to a small number, usually no more than a couple of score, often much less, of party leaders. Only the negative rights of final protest reside in the general body of representatives. These conclusions emerge from the joint consideration of the various systems, and their characteristic defects and merits.

* * * * * * *

CLOSURE AND ORDERLY DEBATE

If it is to be useful and authoritative, the process of legislation, already described, needs safeguards, and, therefore, certain rules have had to be applied in order to govern the character of discussion. These fall broadly into two parts: those which concern the limitation of debate, and those which relate to the right to speak and the orderliness of discussion. As to the first, it is obvious that at some time in the course of debate parliaments must actually accomplish an act of legislation. As a great French authority has put it: 'The Assemblies are convoked in order to examine and discuss, but also to settle matters; a question cannot remain pending eternally; and the simple fact that it is not resolved often creates a cause of agitation without profit to anybody.'[1] All parliaments, therefore, have introduced limitations upon the right of debate, but with varying stringency and purpose.

Let us consider the situation in England first.[2] Until 1881 closure of debate was left to the Speaker and the good sense of the House, and debate was terminated by a simple putting of the question when the former considered that it had been sufficiently discussed. Indeed, if we consider the procedure of the House in the middle of the nineteenth century, it was directed rather to prolonging than to limiting debate. But already, from 1848 onwards, complaints are made in the House that the burden of legislation is so great that limitation is necessary.[3] That is to say, the problem of obstruction of business arose as soon as Parliament was consciously made the instrument of far-reaching social reforms, and 'obstruction' was fraught with serious effects. Now, 'obstruction' is a relative term, depending for its meaning upon the number and urgency of measures a government wishes to pass compared with the time available. It is used to hold up a specific measure, or a measure is discussed at inordinate length in order to derange the time-table of the House and prevent other measures from ever being discussed at all. This is practised everywhere. Yet it was not until the wilful obstruction of the Irish Parliamentary Party in 1881 that the Government began to acquire drastic powers of closure. In that year Speaker Brand, with the connivance of the Government, suddenly terminated debate, although there was a large minority against such a procedure.[4] In 1882 the rule was added that the closure could be moved if 200 voters were in favour; or, if only 100 were in favour and forty only were against,

[1] Pierre, I, 981.

[2] Redlich, op. cit., Vol. III, Part IX, Chap. II; May, Chap. 13.

[3] See *Report of Select Committee of House of Commons on whether any alterations in Forms and Proceedings in this House are necessary*, 1861.

[4] Cf. Redlich, I, 153, 155–9; Morley, *Gladstone* (1911), II, 291–3; Gardiner, *Harcourt*, II, 423.

it could be carried by a simple majority. Even then this was regarded as a provisional concession to emergencies, and until 1887 the Government demanded closure only twice. In 1887 a rule, more in keeping with the pride of the House, was established, the rule of simple closure, whereby any member might claim to move that the question be now put, when unless it appeared to the Chair that the motion was an abuse of the rules of the House, or an infringement of the rights of the minority, it was put forthwith. In 1888 the rule of 1882 was abolished, and the new one was amended by the addition that at least 100 members be in favour of the motion.[1] This put an important trust in the hands of the Speaker, and it has been carried out against the Government, though not often.

Since 1887 more coercive forms of closure have been invented which give the Government a very strong position. They are known as the 'Guillotine', and the 'Closure by Compartments' or 'the Allocation of Time'. In the first, the Guillotine, the method is to resolve the number of days for debate upon a bill, when, the time being arrived, and notwithstanding the state of discussion or the amount of the bill discussed, the 'guillotine' automatically comes down on debate. This was first used in 1887. Closure by Compartments or the Allocation of Time is a procedure at once drastic and yet permissive of a certain latitude to the Opposition. For here the Government considers the whole of the bill as one plan requiring so many days of discussion, and then offers such and such a proportion of the time for groups of clauses. In this method, if the Government is tyrannical, it is possible for it to jump over the clauses which it would rather not have discussed, but, as a matter of fact, the traditions of English parliamentary life, regard for the authority of law, and the fear of future reprisals, cause the Government to come to some arrangement with the Opposition as to the amount of time to be spent on the various groups of clauses. It was first used in 1893.[2] Finally, in 1911, for the Committee and Report stages it was found necessary to introduce the type of closure known colloquially as the 'Kangaroo', and officially as the 'Selection of Amendments'.[3] This permits the Speaker, the Chairman of Way and Means and the Deputy Chairman to decide which amendments offered to a bill shall be debated by the House. This at once gives the Speaker the opportunity of ruling out frivolous and obstructive amendments and of discovering, by questioning the mover, how far the amendments raise serious and comprehensive issues.

The introduction of these rules was not accomplished without

[1] Now S.O.'s 26, 27, 47.

[2] May, 342.

[3] S.O. 27A; May, 347. In 1919 the Chair was given permanent powers, whereas the Standing Order of 1909 only allowed the House to impose this duty by a special motion of the House. Cf. *Debates*, 19 Feb. 1919.

protest from the private member, the demand for liberty of speech being in the earlier stages most poignant, and the battles long and stern. The answer which was made to their claims seems to me to be incontrovertible. The Marquess of Hartington said[1]:

'The principle of closure is an assertion of the principle that the privilege of speech is a privilege which the House permits to be exercised for its own instruction, for its own information, in order to form its own opinion, and that it is not a personal privilege to be used irrespective of the convenience and the efficiency of the House. . . . If it is true that the privilege of speech is a personal privilege, it belongs, I presume, equally to every member of the House. Every member of the House has a right to make use of it to an equal degree when he pleases, and if every member of the House were to make but a very sparing use of that privilege, the question would very soon be brought to a *reductio ad absurdum*. Well, if the right can only be exercised by a few and by the forbearance of the vast majority of the House, I should like to know on what ground it can be contended that such a right as this is a personal right at all? . . . Some hon. members seem to think that this is the only place in this country where discussion can take place. They forget the Press, and they forget the right of public meeting. Do you suppose for a moment that public opinion in this country is only formed by debate and discussion in this House? Do you suppose a great many questions are much more fully, more completely and, I venture to say, more ably discussed outside this House than in it, and that many subjects are fully debated and discussed in the country before they are ever mentioned at all in this House.'

Towards a Will-Organization. The criticism of such doctrines as these was forcible until about 1902, when the rules of the House were remodelled and what had been, it was thought, temporary expedients, were made permanent principles. By that time, both Government and Opposition had experienced the need for the use of the closure, though the Opposition always used the argument of freedom of speech as part of their general strategy. Again and again it is pointed out in *Hansard* that the choice before members was the 'guillotine' or the 'rack', that is to say, either the sudden termination of debate or the agony of all-night sittings. By 1908 Parliament had sickened under such limitations, it being urged that there was no reality in debate. Further, a Liberal Ministry had been returned after nearly twenty years in the wilderness, with a large array of projects of social reform and, therefore, in need of every minute of parliamentary time. Naturally, the Conservative Opposition immediately began to point out the immorality of the closure. Balfour observed that between 1886 and 1905 closure by compartments had been used seven times, whereas in two and a half sessions, from 1906 to 1908, the Government had used it for as many as ten bills,[2]

[1] *Hansard*, Commons, 1882.

[2] 17 July 1908, 1242. Cf. Lord Hugh Cecil, *Debates*, 17 March 1913: 'It used to be a scandal that the Government proposed these Motions; it has now become a joke. There is a certain significance in that. When you have got to the point when nobody is very angry about it and the thing excites no feeling, the House of Commons

and Lord Robert Cecil[1] observed that 'the future historian of the Constitution would find no more interesting topic than the gradual decay of the corporate self-respect of the House of Commons'.

Closure was referred to as the 'gag', and it was urged that it made it impossible to influence a Minister once his mind was made up, because he won his point simply with the passage of time. Later, as regards the 'kangaroo', one hard-working member pointed out that it was seriously discouraging to come to the House with amendments and then to find it impossible to have them debated.[2] Perhaps most important was the criticism that where a Minister knew that the sheer power of the majority would bring him victory, he had no incentive to understand and think out his own position.

'We all know how a bill is discussed. We know how grotesque were some of the answers given by Ministers on this bill. They had not taken the trouble to understand the brief furnished by the permanent officials. They read it out, and very often they read it out wrong. I do not blame them. They are human beings. They know it is quite unimportant what they say under the guillotine. They know that nobody can hurt them and that when the bell rings they will have their cohorts brought in from outside to vote as they are told.'[3]

The retort to these criticisms was the inevitable one which Mr. Asquith made, namely, that the Government were overtaking arrears of legislation, that it was impossible to work without the allocation of time and the experience of the last twenty years had taught that common lesson to all governments, that as much justice was done to a minority as was possible, and this by permitting the Opposition to discuss the things they most desired.

Perhaps the most serious result of the closure is that Parliament loses the nature of a thought-organization and tends to become so plainly a will-organization that the Opposition and many people in the country are prompted to deny the moral authority not only of the Government of the day, but of government in general. For, if matters are to be settled merely by superior numbers, then what is the use of Parliament? Yet the majority could find a reply:

'We honestly and sincerely think that these are good bills. We have put them to our constituents, and we believe that our constituents agree with us and that we have a mandate to carry these bills into law. . . . We believe that we have done hon. members opposite more than justice in the opportunities which we have given them to oppose the policy which we were returned to carry into force.'[4]

must be recognized as having gone one step further down to that abyss of impotence and subservience to the Government of the day which seems every day more ready to swallow it up.'

[1] 17 July 1908, 1255. [2] Wedgwood, 18 Feb. 1919, 858.

[3] *Debates*, 30 Jan. 1913, 1553.

[4] MacCallum Scott, *Debates*, 23 June 1913, 882.

Apart from the injurious effects of closure upon the creativeness and interest of the ordinary member, and upon the tendency to undebated and uncontrolled rule on the part of the Government, closure has the defect of addition to the difficulties of the Speakership. As we have shown, the orderliness of the procedure of the House depends very much upon the impartiality of the presiding officer. But it is difficult to preserve impartiality or the belief in impartiality when so onerous a burden as the choice among amendments is placed upon one man, and when the passions of the House, strongly aroused by modern controversies, are inflamed by limitation of debate. A similar evolution of obstruction, congestion and closure is observable in the Standing Committees of the House of Commons.[1] Whether there is any way out of this we discuss presently.

In the United States a similar process has occurred, and it operates with more tyrannical force because the amount of legislation is much greater,[2] the division of the session is less rational,[3] and party spirit is less tolerant. The rules regarding the limitation of debate were developed between 1880 and 1890, Speaker Reed in the latter year bringing about a veritable revolution in the rather lax methods used against obstruction until that time. The spirit of the changes was explained by Reed as follows.

'The object of a parliamentary body is action, and not stoppage of action. Hence, if any member or set of members undertakes to oppose the orderly progress of business even by the use of the ordinarily recognized parliamentary motions, it is the right of the majority to refuse to have those motions entertained and to cause the public business to proceed. Primarily, the organ of the House is the man elected to the Speakership; it is his duty in a clear case, recognizing the situation, to endeavour to carry out the wishes and desires of the majority of the body which he represents. Whenever it becomes apparent that the ordinary and proper parliamentary motions are being used solely for the purposes of delay and obstruction: . . . when a gentleman steps down to the front amid the applause of his associates on the floor and announces that it is his intention to make opposition in every direction, it then becomes apparent to the House and the community what the purpose is. It is then the duty of the occupant of the Speaker's chair to take, under parliamentary law, the proper course with regard to such matters.'[4]

There appear to be five principles which give the majority the power, at any time, of overcoming an obstructive opposition. They are: firstly, that the Speaker may in his sole discretion refuse to put a motion which he regards as dilatory as, for example, to adjourn, for a recess, or to recommit[5]; and, as the Speaker is the avowed

[1] Cf. *Parliamentary Debates*, 19 June 1931, debate on power of Chairman of Committee on the Consumers' Council Bill to select amendments

[2] Thus, House of Representatives, in the *two* years of the 69th Congress passed 808 public laws and resolutions; the House of Commons passes an annual average of less than 100 public bills and resolutions

[3] Cf. p. 719, *supra*

[4] January 1890, *Cong. Record.*

[5] Rule XVII, No. 10, *Manual*, p. 346.

supporter of the majority, this discretion is very liberally interpreted; secondly, that when a roll-call is taken to determine the presence of a quorum, members shall be counted present even though they do not answer to the call. Prior to 1890 refusal to answer to the call was a regular form of obstruction, since the answer was the only accepted evidence of presence, even though the member stood grinning on the Floor [1] Thirdly, only by unanimous consent can any members speak for more than one hour.[2] Fourthly, the previous question can be moved[3]; and finally, the Committee on Rules, upon which the majority has a decisive number, can report at will to the House arrangements for re-ordering debate and distributing time, and their report is immediately considered if two-thirds of the members voting agree, otherwise another day is found.[4] The minority have no liberties excepting those accorded to them by the good grace of the majority, and, further, the leaders of the majority party (that is, the Speaker, the Steering Committee and Company) possess the power to decide which of the rank and file shall be permitted to speak. There is ample testimony both from within and from outside the House of Representatives that debate is devitalized.[5] We must add to this account, also, what we have said above regarding the enormous hold of the Committees upon the time of the House.

In France the closure is of long ancestry, but as in other countries its use has only become of serious moment in recent years. It is left to the President of the Chamber to decide to close the question when a matter has been sufficiently discussed.[6] If, however, enough members demand it, closure must be put to the vote, but at least two speeches must have been given against the proposition. No number is given as a definition of 'sufficient', so that a good deal is left to the discretion of the President. Upon a motion to vote on closure one member is allowed to speak against it, the intention being to give the minority an opportunity of saying why the discussion should still proceed; and the practice has been to give considerable latitude to such speakers. Pierre says further.

'Closure is a serious measure which stops a debate, which deprives a certain number of members of the right of being heard, which may exercise a great influence upon later and decisive votes. In consequence it cannot be pronounced when the majority of members is not present. This, again, is a limitation on the power of any small body which happens to be in the Chamber and wishes to snatch a victory.'

[1] Rule XV.

[2] Rule XIV This dates from 1841 when Congress was already too congested to permit the old two- and three hour speeches. Congestion became more and more severe as new states filled up with population and obtained representatives.

[3] Not used in Committee (Rule XVII). Permits of forty minutes' debate where the proposition has not yet been debated.

[4] Rule XI; *Manual*, p. 313 ff., and Alexander, pp. 479, 480.

[5] Rogers, op. cit., p. 159.

[6] *Règlements*, 1876, Art. 108 (and Pierre, I. 918 ff.); 1915, Art. 48.

in the House. The character of Sir Robert Peel[1]—grave, earnest, humble, just, and not too original, leading, not hectoring, the House, is the best present style, with a touch of the laughter-provoking. Peel was called a great 'House of Commons man' for these qualities, and Disraeli soon learnt to confine his greatest daring to his novels.[2] The expenditure of emotion is small compared with other countries, as also the extent to which the rank-and-file, at least, appeal to the public beyond the walls of Parliament. It is in the power of the Speaker to rule a member out of order for repetition, frivolousness, and irrelevance.[3] This is rarely done, it being left to the House itself to cry down a bore. More could certainly be done to overcome tedious

by Lefas, in *Revue des Sciences Politiques*, 'La Réforme des Methodes du Travail Parlementaire', 1931):

Duration	Categories
No limit	Members of the Government, Commissioners of the Government.
One hour	Presidents and *Rapporteurs* of Commissions, authors of interpellations, first signatory of a proposition of law or resolution, speakers mandated by their Groups.*
Half-an-hour	Authors of amendments: speaker opposing the previous question; speakers speaking against the previous question.
Quarter hour	Speakers on Chapters of the Budget to which no one has put amendments, authors of interpellations in reply to the Government, questioners who develop their questions: all speakers where the rules do not fix some other duration.
Ten minutes	Authors of motions falling in Article 49 relating to the previous question, supporter of a demand for immediate discussion, authors of a demand regarding the order of the day, priority, or call to order, one speaker to combat these demands
Five minutes	All members who speak with the consent of a recognized speaker, an interpellator in reply to a minister regarding the date of the interpellation, oral questioners to reply to the minister; authors of motions within Article 49 *bis* with the right of reply, deputies rising on a personal fact, one speaker on the closure, speakers after closure to discuss the putting of the question or to explain their vote

* On this class Barthélemy says (in the article cited, p. 29): 'The resolution gives a new consecration and importance to political groups . . . Political groups have to-day an official existence and play a part in the functioning of the Chamber. . . . As long as the groups can nominate the members of Commissions, there is nothing extraordinary in their power to designate speakers. . . . In order that a speaker shall be considered as mandated it suffices that he presents at the presidency an attestation of the president, vice-president and secretary of a group. In fact, the group does not meet except in grave cases and when there is competition.'

[1] Bagehot, *Biographical Studies*.

[2] Buckle and Moneypenny, *Disraeli* (Edn. 2 vols.). Vol. I, pp. 625 ff.

[3] May, pp. 306–8. S.O. 19.

repetition, but were the power of repeating arguments previously raised by other members taken away, then, alas! alas! the final existing argument for the retention of the private member would be gone. The Speaker is usually severe with irrelevance, although members show great ingenuity in proving the relevance of subjects poles asunder. Nor is it easy to take away a member's right to speak when, in the very next second, he *might* become relevant and significant: that thought is at the root of the unwillingness to put formal time-limit to speeches.

In America the quality of parliamentary oratory is different from that in England. Congressmen love fine-sounding phrases with which American history, especially of the era of the Declaration of Independence, is full, and to spout great principles. Moreover, the size of the House, which is tremendous, and the constant coming and going of members through the swing doors, give the impression that the member is bellowing in the middle of a noisy fair-ground. No one takes any notice of what a member says, partly because he cannot be heard, and partly because the shape of the law has already been determined in Committee. This, perhaps, is one of the causes of the flights of oratory, the principle being that if you cannot say something useful you may as well say something grand.

In Germany discussion tends to be quiet and business-like, save for the sudden gusts of class passion which sweep across the assembly from the Communist and National Socialist benches,[1] but it is admitted on every hand that discussions in the full Assembly are mainly demonstrations for the electorate, and not directed to changing votes. Recent advice for speaking in the Reichstag by an old parliamentary hand indicates the nature of discussion[2]

[1] Cf. Muller-Meiningen, op. cit., p. 118 ff. 'The German Parliament generally prefers a certain sober tone of sound common sense which, when once attained, can also rise to great warmth and even pathos where such warmth is necessary.'

[2] Loc. cit. 'The dangers for the Parliamentary speakers are first and foremost repetition, boredom and prolixity. . . . Parliament can bear illumination when it assumes only a certain amount of strict scientific substance and accumulation of factual and legal material. If the speaker notices a weariedness, then a pertinent joke, a personal reference, a personal appeal to the audience, tides over the transient fatigue. . . . Certainly the member will not and ought not in general to speak only to the comparatively small circle of Parliament but also for the millions: *zum Fenster hinaus*. In general, the debates in all German Parliaments, particularly the Reichstag, as I have often repeated, suffer from tediousness and lack of vivacity in comparison with the Latin Parliaments. The Latin has æsthetic joy in good speeches and so has the Englishman; but also, technically, *the President's list is a condemnation to tedium*. In the French, as in the English, Parliament, the opponent interrupts the speaker, who is without the protection of the President. The first interrupter is perhaps again contradicted, and thus speech and counter-speech follow each other quickly and directly. . . . But the too emphatic sergeant-major manner of the President's control of speeches, the school-master rule of the President, is one of the causes of the insubordination of our modern German Parliament—self-control is given too little opportunity.

'The chief cause of the tedium of the debate in the German Parliament is cer-

In France oratory still has a great appeal and is more frequently denunciatory, than helpfully directed to the improvement of its resolutions.[1] This hardly matters, so far as legislation is concerned, for, as in Germany and the United States, the principal work is done in the Commissions, but it is a serious deficiency in the debates on control of administration; owing to the lack of party discipline and loyalty, *votes are changeable by an apt speech* and can be lost by a stupid one. Briand[2] owes his ascendancy to his eloquence, and Clemenceau once fell from the Prime Ministership by oral clumsiness. The temperament and traditions of the Chambers produce excitable, restless discussion.[3]

In England and the United States members speak from their places, and being on the floor are simply on a level with other members and, therefore, receive no physical stimulus to speak otherwise than as man to man. In Germany and France the orator may mount a tribune, and there he sees below him and around him an arena full of spectators, and it is generally agreed that this stimulates the speaker

tainly the vicious custom of considering resolutions first in the committees, and of using the *plenum* of the Parliament simply as the formal registration of the resolutions made in the lobbies. So speeches in the full assembly remain without any effect: no one can be convinced, no one wants to convince anybody and no one is convinced. . . . The German system may originally have arisen from a certain caution and undue conscientiousness, perhaps out of the general doctrinaire professorial German attitude towards any intellectual activity.'

[1] Cf. Barthou, *Le Politique*, p. 48: 'For a speech pronounced at the tribune should be an act; when the discourse or the act has commenced, emotion has already taken another form. A battle is begun, one must win; one has thrown oneself into the water and one must swim towards the bank. Some go under beneath applause, others beneath sarcasm, but the success of an act is not a judgement of its value. The idea vanquished to-day will perhaps be triumphant to-morrow, and perhaps to-morrow's events may make the orator acclaimed yesterday pay dear for his passing triumph.'

M. Barthou (op. cit., p. 62) gives six precepts for speaking in the Chamber of Deputies: (i) Not to abuse citations and not to make excuses for them. (ii) Not to affirm one's frankness too frequently. (iii) Not to say one does not wish to be a minister. (iv) Not to interrupt except necessarily, discreetly and prudently. (v) Not to hear interruptions and not to reply to them except in the measure in which one may gain from them. (vi) Never to force the voice to enforce silence: wait!

[2] Ibid., p. 50.

[3] Cf. ibid., p. 71: 'The tribune is a great peril, because it is a scene where one plays a part in a hall where the spectators take their part in the piece. Different from a play in this: all is unforeseen—one does not always know how it will open because the Government has the right of intervention at any moment, and may—by an initial declaration which may even bring about an adjournment or the closure—disturb the order of the spectacle; still less can one foresee how it will finish.

'There is an atmosphere whose extremely variable pressure can be registered by no barometer. A breath is enough to make everything change. . . .

'These tumults, spontaneous or concerted, this fever, these agitations, these surprises, these incidents, explain why those accustomed to the conditions of the Bar where the dossiers have been exchanged . . . before the blows—why celebrated barristers have failed at the tribune.

'At the Bar there is a discussion, an ordered dialogue, known conditions which fix the debate—at the tribune there is a battle.'

to attempt to 'show off'; who can avoid self-consciousness (at least) in such a situation? [1]

Further, in England the seating arrangement, by accidental evolution, groups the Government on one side and the Opposition on the other, a very clear mark being thus made in the for and against. In the other countries, the seats are arranged in a semicircle, in France and Germany special seats being given to Ministers facing the Assembly, while in the United States the Floor Leaders occupy certain seats by the gangways in the semicircle. In the Continental assemblies this arrangement makes a little for confusion and theatricality, but it is a rather natural result of the group system. The Continental arrangement of writing-desks is very bad as it tempts members to conduct their correspondence, and write articles for the Press, or novelettes in shelter, while the flaps of the desks can be used to out-rattle speakers. Perhaps consideration for the convenience of orators goes furthest in America, where spittoons (or cuspidors) are arranged along the gangways at proper intervals.

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The result of this discussion is, I think, to show very clearly the great extent to which party organization has made itself master of parliamentary activity, ordaining debates and speakers as it thinks proper, so that it may fulfil the promises made during the election campaign, and this was foreseen by some, and defended, a generation ago, and even earlier, when parliaments became so obviously the vehicles of popular opinion.[2]

One other thing needs consideration. It is impossible to continue parliamentary discussions excepting on two bases, first, that there shall be quiet during discussion, and secondly, that members shall not use expressions which rouse the temper of the House or impugn the good faith of other members, or challenge the fundamental validity of parliamentary institutions in the form created by the Constitution.[3] All countries, therefore, have rules to secure these objects. We need not spend time in discussing the details relating to the first, namely,

[1] Cf. Poincaré, article cited, p. 307.

[2] Harcourt (during the debates on the closure rules in 1882, column 1762): 'I believe the Government of this country can only be conducted by Party. If you have not organized Party, what have you got? You have got the caprices and fancies of individuals in a chaos, and the public good perishes in the midst of it. The organization of Parties is nothing less than the predominance of the counsels of those who are chosen by the Party to advise them, because they think they are the fittest advisers. . . . The Party which expects to hold power, or accomplish anything, always must accept the advice of those whom they have placed in the position they hold for the express purpose of advising them; they have made them their leaders for that purpose. To talk of coercion seems to me the most absurd thing in the world. Why, a Leader of a Party—and especially the Leader of a Government—is there by the free choice of those with whom he acts. At any time their breath can unmake him, as their breath has made him. He is their champion, it is true: but he is also their creature.'

[3] Cf. May, 322.

the prevention of disorderly conduct, excepting to say that at a certain point sessions are suspended or disorderly members expelled from debates.[1] And further, such disorderliness is naturally present wherever differences among groups are at all deep-rooted, as, for example, now, in all countries where economic inequality causes the passionate resentment of its attackers and defenders; and further, where racial or religious differences are strong.[2] Sometimes these differences may be so great as to make the parliamentary method entirely impossible. Personal vanity or uncontrollable natural impatience may sometimes be too sensitive to permit quiet discussion, as in France and Italy.

All members are apt to use expressions which rouse the feelings to a pitch where patient deliberation is impossible. Natural impatience with the slowness of social reform, or the apparently wanton destructiveness of those who cannot see our point of view, too many lengthy sessions even, constantly cause outbursts. Therefore, certain expressions are ruled out. Let us indicate some of these rules, for they give a good insight into the conditions of democratic government. In France the rules of the Chamber of Deputies (Article 47, of the 4th February, 1915) forbid 'all personal attacks'. This phrase and its predecessor, 'personalities', have been interpreted by long usage. Members are forbidden among other things to charge others with having fought their election campaigns unfairly, from calling a decision of the Chamber 'a parliamentary brutality', qualifying a law by the term 'hypocritical', or 'spoliatory', from calling a member a 'coward', from asserting of a vote of the Chamber that it is a 'vote for civil war', and the words 'lie' or 'liar', 'traitor', 'assassin', 'shameful', 'fraud', 'unblushing', 'servile', and so on, are prohibited. It is perfectly clear that the use of such terms must divert the attention of members from business to defence and revenge. Moreover, if the good faith of parliamentary adversaries is not accepted, even though it is undeserved, the result is direct repudiation of the democratic theory, for if you do not believe your opponent, is not the only solution either surrender or a simple appeal to civil war? Consequently, rules of this kind must be strenuously upheld. They are to be found in the procedure and the practice of the other parliaments with which we are concerned. The maintenance of order imposes, of course, a very serious burden upon the presiding officer of the assembly, and has in recent years provoked the criticism that he is not impartial, for the cunning member is able to wound and dodge before his dart is discovered.

[1] Cf. May, p. 220, and S.O. 18. Cf. Vogler, op. cit.; G.O. 89–94; Pierre, para. 484 ff.; *Manual*, Section 359 ff. On the Continent suspension of sessions is frequent, in Anglo-Saxon countries it hardly ever occurs.

[2] e.g. in Poland and Serbia; while in the Southern States of U.S.A. racial prejudice is so strong that it has excluded the negro race from discussion altogether.

As the inevitable time comes when the majority throws off its bonds, and enforces its social policy, 'unparliamentary' expressions become more common. What concerns members is not so much that they are uttered, but that they are often true. *Yet the truth may be thought, but not be told; for the whole of parliamentarism is an edifice of conventions erected on a very fragile basis of civilization.* This subject is on a par with that of the right of revolution which has been denied written foundation in the Constitution by most political scientists, lest men should fly to that as the first, and not the last, resort.[1]

PARLIAMENTARY CONTROL OVER THE EXECUTIVE

We observed at the outset that parliamentary bodies were not exclusively engaged in legislation but that their functions were mixed. Historical evolution has deposited with them what we broadly call the 'control of the executive', a control often referred to in English political discussion as being quite as important as legislation and as making Parliament the 'grand inquest of the nation'. Broadly, this means that Parliament is to keep the Executive and the Civil Service within lines of policy which it supports. Now before we enter into a discussion of the extent to which parliaments do now control the Executive, the meaning of the word 'control' needs definition. We do not mean that parliaments have, or pretend to have, or ought to have, the power of continuous intervention in administration and positive participation in the execution of the law. They do not, in fact, do more than act as the judge and the corrector of the Cabinet and its administrative assistants. We could show, further, that it is almost impossible to do more than this (take, as an example, their financial powers!), and that where they confine themselves to this alone the result of joint work of Parliament and the Executive is better than where Parliament attempts to interfere more positively.[2] We must, therefore, observe in what countries parliaments attempt to do more than control, and consider the lessons of that experience. One other point. It is not always necessary for parliaments or any controlling body to *intervene*. Their mere presence is sufficient to establish a standard of behaviour for Ministers. Kant said that the value of the social-contract theory was not in its historical truth, but that it set a standard by which rulers and ruled might judge of governments. Similarly with control over the Executive: we must give due credit to the influence of the simple presence of Parliament, to

[1] e.g. Kant, *Principles of Political Right* (trans. by Hastie, 1891), p. 50: 'For, such resistance would proceed according to a rule which if made universal would destroy all civil constitutionalism, and would annihilate the only state in which men can live in the actual possession of rights. . . . The prohibition of them (insurrections) is therefore absolute.'

[2] Cf. Mill, *Representative Government*, Chap. V.

the 'silent rhetoric of a look'. However, this is not all; nor is it enough.

Control of the Executive has the longest history in England and very great importance is attached to it, some holding that Parliament's chief duty is still what it was before the enthusiasm for statute-making began after 1832. Upon examination of the opportunities and machinery for control, we find that the House is not very effective. Let us consider the occasions when the House may inquire into the conduct of administration. The first occasion is the debate on the Royal Address to Parliament, the equivalent of the Continental 'ministerial declaration', which occupies something like five or six days. Then there are a little over twenty days which are devoted to the discussion of the Estimates. Here, as we have pointed out, the discussion is not so much on the economy of the Estimates but is rather a general discussion upon the administration of the department demanding supplies. Further, upon going into committee for the purposes of financial legislation there are four more days for the discussion of general grievances in regard to administration.[1] And finally, we may count from two to three days a session, at the utmost, when the motion to adjourn the House upon a matter of public importance is accepted by the Speaker,[2] and a subject of administration debated, or when the Government itself gives time for the discussion of some important matter which is disturbing the public mind, often called 'Votes of Censure', and a couple of days' debate on the Easter and Whitsun adjournments. Altogether, then, we may reckon a little over thirty days in a whole year when the House concentrates upon the subject of administration. This is a large estimate, and is rarely ever exceeded.

If we take into account the enormous amount of money spent on the public services, and the vastness of the field of public administration, if we remember that that field comprises all home and foreign affairs, Dominion and Colonial relationships, we can see at once that the control over the Executive is necessarily very superficial. The most we can say is that since Ministers are unwilling that their department shall be the subject of censure they are likely to do everything to remove and avoid flaws. The greater part of the time is indeed spent upon getting information, not criticizing it, and we must remember what our discussion of parliamentary procedure has demonstrated: that time is short, party organization strong, and discipline draconic. Little more can be done, therefore, than to frighten the Government, to urge it on, to threaten it with public exposure, and very weakly to press it to amend its ways, and to cause it to search its own mind.

[1] S.O. 17. On the question 'That the Speaker do now leave the chair' a ballot decides what shall be debated.

[2] S.O. 10.

Questions. This is, however, not the only opportunity for a research into the day-by-day administration. An opportunity perhaps more powerful, because it is more continuous and worrying, is the practice of parliamentary questions. This is one of the most characteristic institutions of British parliamentarism. For about an hour, from 3 p.m. to 3.45 p.m. every day, questions may be addressed by any member to Ministers.[1] Questions may be addressed to Ministers only and other members definitely deputed by the Government to answer for Departments which have no generally responsible Ministers (e.g. the Ecclesiastical Commissioners). The nature of permissible questions is determined by Speakers' Rulings, which, summarized, give this result: that (*a*) they must be genuine questions to elicit information, (*b*) their subject-matter must involve the responsibility of the Minister.[2] A clear day's notice must be given of questions (which means that the answer is given two days later) and they are answered either in writing or orally.[3]

Now questions have become so important a part of the function of the House from the standpoint of the public, and so necessary to the local reputation and personal pride of the private member, that they have fast increased in recent years, and would grow beyond the capacity of the House to entertain them were they not rigidly limited. Hence, no members are permitted more than three 'starred' (oral) questions on any one day. The oral answers may give rise at once to 'supplementary' questions, and though the answer to the original question is prepared by the civil servants (and sometimes 'supplementaries' are anticipated) so that the Minister will not be surprised, the 'supplementary' may very well reveal faults in either his own knowledge or his department's work. The Speaker strives to keep down 'supplementaries' to the point where they will not interfere with the answer to other members' questions. Ministers, of course, are not anxious to provide members with answers which will damage the Government or themselves or embarrass their own official assistants. Therefore, both the civil servants and the Minister not infrequently invent and return answers which blunt the edge of criticism but do not reveal the information required. The answers given glide lightly over palpable mismanagement, the members of the House are tickled by the substitution of wit for confession, and a roar of laughter often wrecks the question and rescues the department. For right or wrong, the House goes on; and stops only on another occasion when something sufficiently scandalous to impress the ordinary member is revealed. The unreadier the Minister to answer, provided the unreadiness is masked, the less the House is likely to disturb him—it

[1] S.O. 9. [2] Cf. May, p. 238 ff.

[3] Notices of such questions are starred; written answers are given to the others, usually for those of a local and less important kind, often requiring a statistical return.

seems unsporting to badger a man. With all these faults, the House is usually able to detect where something is wrong, and even when it is not, Ministers are apt to think that a questioner possesses a larger fund of knowledge than he in fact does. It must be remembered that the number of questions written and oral amount (without supplementaries) to nearly 200 per day.[1] No lie can stand such continuous and unexpectedly oblique cross-examination for long. Hence, the Minister is impelled to pass on his distasteful and perilous ordeal to the permanent staff, for only if they are efficient will he continue to live undiscredited.

There are many critics of Parliament's control over the Executive. They argue that the opportunities and the machinery of criticism are far too few, and if we have regard to the immense amount of work which is now under the control of public administration, we are forced to admit that the machinery of control is indeed inadequate.[2] The Government escapes day after day because there is no time to probe the matters which give ground for suspicion,[3] and because members are not sufficiently sure of their own information to offer an unyielding challenge.

Law-making by the Executive Departments: Nor is that all. All Parliaments have been obliged to devolve to the departments a large volume of secondary or departmental legislation which is made in the form of Rules and Orders. The reasons for this are various: first the enormous amount of legislation compared with the time available for its discussion; secondly, the highly technical issues involved which Parliaments as at present organized cannot master and decide; thirdly, the need for a certain administrative flexibility or discretion in the prompt handling of new situations. In Great Britain in 1890, 168 Rules and Orders were made; in 1913, 414; in 1928, 800. Some of

[1] Campion, op. cit., p. 124, gives the numbers of oral questions thus:

Year	Daily Average
1847	1
1880	13
1923	109

[2] Cf. *Report of the Machinery of Government Committee*, p. 15: 'It has been suggested that the appointment of a series of Standing Committees, each charged with the consideration of the activities of the Departments which cover the main divisions of the business of Government, would be conducive to this end . . .

'It is not for us to attempt to forecast the precise procedure under which interrogations and requests for papers emanating from such Committees should be dealt with. But the particular argument in favour of some such system to which we feel justified in drawing attention is that if Parliament were furnished, through such Committees of its members, with fuller knowledge of the work of Departments, and of the objects which Ministers had in view, the officers of Departments would be encouraged to lay more stress upon constructive work in administering the services entrusted to them for the benefit of the community than upon anticipating criticism which may, in present conditions, often be based upon imperfect knowledge of the facts or the principles at issue.'

[3] It has been urged, for example, that a member should be permitted to debate, for a few minutes, the answer given by a Minister to an oral question.

these need not come before Parliament for scrutiny at all; some need an affirmative resolution of Parliament; others, again, are put before Parliament for challenge for a certain space of time; some, according to their enacting statute, are, when made, to have force 'as though they are part of this Act'. It is a power wide in scope and fearful in compulsion, and it has raised weighty but, so far, fruitless criticism.[1] Hardly any member of Parliament knows this, is equipped to challenge such Rules and Orders, and the House, as a body, is even less equipped, and ready to review them; and unless any special interest, economic or otherwise, is spectacularly affected, there is no challenge. The Rules and Orders may then be made by the Departments, sometimes after compulsory consultation of advisory representative bodies, pass through Parliamentary twilight, and only be subjected to a real public scrutiny, when they cause expensive litigation, because they are *ultra vires*. Even, then, their political reasonableness, as affecting public liberty and utility, is judged by no tribunal. The House of Lords has pointed the way towards an improvement in the procedure respecting Rules and Orders. No motion for an affirmative resolution of the House in connexion with Orders may come before the House for discussion until it has been discussed and reported upon by the 'Special Orders Committee', to be appointed annually. Petitions are entertained when the Order is of a Private Bill nature; where it is of a Public Bill nature, a special inquiry may be recommended on grounds of policy, principle, or precedent. It is certain that the Rules and Orders are bound to increase with the evolution of the social policies of our time; it is equally certain that the law-making body is ill-organized for their control, while the ordinary Courts of Law are irritated and often incapable of properly measuring administrative necessity and justification by the standards they justly use in general.

A similar phenomenon is witnessed on the Continent; indeed, it preceded the development in England, because there was always recognized a much wider power to make rules inherent in the Executive; this power, however, is becoming less and less recognized as existing apart from deliberately empowering statutes or constitutional clauses. In Germany the Cabinet is obliged by considerations of time and technical difficulty to pass what are called 'Frame-work laws' (*Rahmengesetze*), while obtaining for itself the power to fill out the law by executory regulations. For example, the Coal Economy Law consisted of six paragraphs and the executory regulations of 133.[2] Most of the Rules (*Verordnung or Verfugung*) (except those which concern the

[1] Cf. Hewart, *The New Despotism*, 1929, especially Chap. VI; Allen, *Bureaucracy Triumphant* (1931), esp. pp. 1–106; for a more moderate discussion cf. Port, *Administrative Law* (1929); Carr, *Delegated Legislation* (1921), and Farlie, *Statutory Rules and Orders* (1927), Urbana, Illinois.

[2] Cf. Schlegelberger, *Rationalisierung der Gesetzgebung* (1928); and Dessauer, *Recht, Richtertum und Ministerial bureaucratie* (1928), p. 93 ff.

regulation of the civil and armed services) must, by various statutes, be first placed before representative consultative bodies in the departments before they are valid.[1] In some cases a Parliamentary Commission must assent to the order, in others there is the English counterpart of submission to Parliament for approval or challenge. The rules are challengeable before the ordinary courts or the special 'administrative' courts for inconsistency with the statute (they must be *intra leges*), and for their obedience to the processes of creation provided by the statute. In France there are two types of Rules (*Règlements*): simple Rules and Rules of Public Administration (*Règlements d'administration publics*). Their number has grown for reasons similar to those in other countries.[2] Both are subject to actions for annulment before the *Conseil d'État* in a direct attack upon them, or indirectly before the ordinary courts, when their validity is a question incidental to the answer of some case in which they are involved. The simple rules are based upon a general rule-making power of the President given in the Constitution (February 25th, 1875), article 3: 'The President assures and superintends the execution of the laws.' This power is apt to be used tyrannically in war-time and times of social and financial crisis, with little remedy possible to the citizen, even if he does appeal to the court, against the emergency statutes which are carried out by Rules. Everywhere, such statutes with rule-making powers tend to be used as the only means of action available to governments faced with distracted and incoherent parliaments. The Rules of Public administration are made by the President (i.e. the Cabinet) on the express basis of parliamentary grant. In this case the *Conseil d'État* must be consulted in the confection of the rules. For this purpose the *Conseil* adds to its ordinary membership[3] the highest Civil Servants in the various Departments. Only since 1907 are these Rules challengeable —before the *Conseil d'État*.[4]

One other thing. Whatever the efficacy of Parliament's control during the session, it has to be admitted that there is no control whatever between sessions, that is for upwards of three months in the year, and this is a point of importance to which attention should be paid. Finally, the House of Lords now acts as a critic of administration, and, although it has not the power or the weight of the House of Commons, yet it counts for something, and public opinion, at least on the Conservative side, points with pride to this function.

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The French tradition of parliamentary control of the Executive since the Revolution is stronger even than the English. Members

[1] Jacobi, in *Handbuch des deutschen Staatsrechts*, II, 236 ff.; Fleiner, *Institutionen des deutschen Verwaltungsrechts*, p. 70 ff.

[2] Cf. Nezard, *Éléments du Droit Public* (1931), p. 222; Jèze, *Traité de droit administratif* (I, 378 ff.); Duguit, *Traité*, IV, 666 ff.

[3] Cf. Chap. XXVI, *infra*.

[4] Cf. Jèze, op. cit., pp. 379–84.

of the Chamber of Deputies and the Senate often argue and act as though they themselves were the Ministers and entitled positively to conduct the administration. The machinery of discussion of the Executive is fourfold. There are debates on ministerial declarations; they come as often as a new ministry, and the need, two or three times a year, for explanation. Then there are questions, which occupy a subsidiary place in the French Parliament, but which have grown in importance since 1900. No more than two questions may be asked either at the beginning or end of two sittings per week; but they are really a small debate; the questioner has a quarter of an hour to develop his question—the Minister replies, and then the questioner has another five minutes. At least one half an hour is spent on each question. As a consequence of the small opportunity of oral questions, and the deputy's desire to call public attention to himself, the written questions go into their thousands per session.[1] Then there are interpellations, a form of control unknown in Anglo-Saxon countries but very important on the Continent, and a continuous, strong and sometimes fussy control exercised through the parliamentary commissions. Let us consider the peculiar and principal methods of control of the last two—the interpellations and the commissions.

Interpellations. The right of interpellation is not given by the Constitution, but it is deemed to be an immediate and fundamental implication of the principle of ministerial responsibility, and from the Revolution of 1789 the tradition and practice of a particularly strict accountability of Ministers has developed and gives force to the principle. It is an important minority right, and a bludgeon wielded over the head of Ministers. The interpellation is a kind of question, long and rather querulous, of the nature of an English vote of no confidence, and its purpose is to put the Government to the trouble of explaining its objects and methods in the particular branch of its policy and administration which is attacked. Any deputy may address an interpellation to a Minister; that is, any one deputy unsupported by seconders. Further, the permissible subject-matter is very wide, even including the appointment of a particular Minister. The interpellation comes on the programme at a date fixed by the

[1] Barthélemy reports about 21,000 written questions in the Parliament of 1919–24. Cf. Pierre, op. cit., paras 650 ff., and for 'supplementary questions', especially *Supplément*, p. 939 ff.

Règlements (1915), Art. 119: Written questions concisely put are deposited with the President of the Chamber. In the eight days which follow their deposit, they must be printed with the replies made by Ministers. Ministers have the right to declare in writing that public interest prohibits them from replying, or exceptionally, that they require time to gather the elements of the reply.

Art. 120: Oral questions can at the commencement or end of sessions be addressed to the Minister after he has previously accepted them; only the deputy who puts the question has the right of speaking after him and then briefly.

President of the Assembly and his coadjutors for the fixture of the Order of the Day, but it is an imperative condition 'that the Chamber cannot fix the day of debate before hearing the views of the Government'.[1] An interpellation may be refused an answer by a Minister even when the Chamber has granted it a hearing—but such a course is obviously dangerous if pursued often and against strong Group-feeling. No interpellation may be put off by the Chamber for more than one month where domestic policy is concerned; but in foreign affairs there is no limit to relegation.[2] In the hey-day of its power it is the Government which settles whether it will be interpellated and when; in the days of its weakening it is obliged to accept interpellations which will hasten its downfall.

Broadly, then, the Ministers are subject to attack from many directions; and usually, save in foreign affairs, are bound to reply within a reasonable time. It is to be expected, then, having regard to the nature of French deputies, that the Government would be severely harassed by interpellations. The expectation is, indeed, fulfilled, and to such an extent that the regular day for interpellations was in 1900 fixed on the Friday of each week. Interpellations, then, usually fall on Fridays—and their limitation is a serious infringement of the rights of the minority—though an unavoidable one—for many interpellations are never reached, being put off from week to week until no time remains for their discussion. Thus the power to put off discussion of an interpellation for one month is practically the destruction of that interpellation, for there is such a crowd of them that it will probably never be reached. Before the limitation the Méline Cabinet discussed 218 in a little over two years of office. After the new rule began to operate an improvement took place, but not a great one. The legislature elected in May, 1902, had by October, 1904, put down 262 interpellations, of which 120 were discussed, and ninety-eight voted on. By July, 1909, the number of interpellations in the legislature of November, 1906, had reached 293, of which 189 had been discussed in 128 sittings, and the President of the Chamber calculated that this equalled one-fourth of the whole of legislative time.[3] The total number of interpellations in 1924–8 was 842. Of these, 432 were not discussed at all. In the case of 231 interpellations only the date for the holding of a debate was discussed. Debate on them was either indefinitely postponed or (in extremely

[1] Pierre, I and III, para. 657.

[2] Consideration of this exception would seem to point that its cause is the belief that in the realm of international relations nations are exceedingly sensitive to the danger to them contained in the policies and plans of other nations, and, therefore, interpellators, perhaps without the restraint of the responsibility of office, might make exaggerated statements, or cause the divulgence of plans, which when fully matured would be taken without umbrage, but at the moment would cause trouble.

[3] J. Off., 13 July 1909.

few cases) it never took place even though a day was fixed. About thirty of these were actually withdrawn. Although the speeches in these discussions are supposed to be confined strictly to the question of fixing the date and the President often calls to order the interpellator who goes beyond the point, we find statements made by the latter and by the Government which are quite explanatory and sufficient to clear the issue, thus doing away with the necessity of holding a formal debate.

Further, twenty-seven interpellations were actually discussed, but as no 'ordre du jour' was moved, the discussion was closed by the President. One hundred and fifty-two interpellations were discussed and led to the presentation and adoption of the 'ordre du jour'.[1] It will be noticed from the last few sentences that the Deputies have tried to find another way of making themselves heard—by debating the date of the interpellation. This practice has been limited by new rules: only minister and interpellator may speak, the latter has only five minutes, he may raise the matter only at the end of the sitting. The interpellation is terminable in one of three ways—without any vote at all, when the incident is simply closed; or by a vote upon the 'order of the day pure and simple' (*ordre du jour pur et simple*) or by the 'motived order of the day' (*ordre du jour motivé*). The first-mentioned is hardly more than a question. The second is a resolution expressing no opinion on the merits or demerits of the Government's case; it is a reservation of opinion and the House proceeds casually to the next business. But a ministry may have learnt by the tone of debate, and from abstentions in the voting, that it is disliked, and may resign because it was damned with praise too faint. The *ordre du jour motivé* is a definite vote of confidence in the Government or a definite withdrawal of confidence. Thus: 'The Chamber, considering the assurances of the Government, is of the opinion that the consequences to the mining industry have (or have not) been and will continue to be (or not) disastrous, passes to the Order of the Day.' The negative is virtually an overthrow of the Cabinet.

Now it is possible for interpellations to be joined, and frequently they are, with the result that the diverse passions of the Chamber are joined and focussed, culminating in a vote of censure on the Government. This is a common way of defeating a Government and about three-fifths of ministries have thus fallen.

[1] Summary (1924–8):

Interpellations	
No Discussion	432
Discussion for fixing day of debate	231
Discussion, but not resulting in 'ordre du jour'	27
Discussion leading to presentation and adoption of 'ordre du jour'	152
	842

What, then, is the significance of the interpellation as a means of control of the Executive? First, we must remember that it is not only the nature of the interpellation which destroys ministries, but the nature of the party system and the deputies' peculiar temperament and views of parliamentary rights. These are the root-causes of the fall of ministries, and these have produced the most appropriate implement, namely, the interpellation. Secondly, is the interpellation a good means of administrative control? It is certainly a frequent and sharp means, which causes Ministers constant anxiety for the quality and direction of their policy and departments. Even where the interpellation is withdrawn and never debated it is a threat, and we have seen that many are taken to an issue. But it cannot be good for Ministers to be in hourly peril of fall, for this prevents them from attending with independent mind to the solid and long-period merits of policy, shakes their confidence, and puts a premium upon window-dressing. There are some things which the deputy or the ordinary member of parliament cannot appreciate until he himself is in command of the actual administration of a department. To question is often enough, with the ultimate reserve (not the immediate threat) of a right of destruction if the question is not properly answered. Interpellations, however, have been developed rather destructively. They too often unite factions into a temporary and sudden opposition only for the purposes of killing a Ministry, and the main intention is not firmly to direct a Government which is to continue in office, but mend its ways. The system is too harassing when we consider the vast amount which a Minister must do if he wishes to control his department with any firmness and completeness. Usually, however, and the figures given bear this out, the Deputies are content with a really tumultuous oratorical jubilee; they do not mean anything by it, and the Minister is able to get his Order of the Day voted after a general political address which concerns itself not very much with the details supposedly under cross-examination.

The Commissions. A steady and not entirely wholesome pressure is maintained by the Commissions, whose organization and legislative work we have already examined. It is quite clear that Commissions with such important legislative power come to have regular and frequent connexion with the Departments, and the Ministers and Departments are obliged to submit to them lest the members of the Commission engineer the rejection of Government legislation or financial proposals or provoke an interpellation. Hence in session at the Palais Bourbon or at the Ministries they demand information, make criticisms, suggest corrections, and are the recognized leaders of arrangements for debates on the policy of the Department whose work they claim to supervise. We have already said that former Ministers are often Chairmen of Commissions, and these

are particularly inclined and able to attempt the day-by-day control of administration. Indeed, without grant of power in the Constitution, or in the Rules of Procedure, the Commissions have come to claim a title to partnership with the Government. Ministers, of course, complain of interference, but the Commissioners contend for their power successfully. Poincaré, who before he became President of the Republic was Chairman of the Budget Commission, and enjoyed the administrative power which this position gave him, saw things with other eyes when he became Prime Minister after the War.

'Naturally this collaboration (during the War) which was not always without its disadvantages, gave fresh tendencies to the Commissions. They came to look upon themselves, more and more, as sharing the executive power. They examined Ministers on the smallest detail of their administration. They continually abused the right of interpellation, essential safeguard though it may be of Parliamentary Government. They summoned Ministers before their Bar, like veritable criminals, and they departed further and further from their proper legislative functions. Since the War the situation has grown worse. . . . Each of these Commissions calls Ministers before it, catechizes, and challenges them. Thus, harried on all sides, how can the Government find time to govern? As it is, frequent ministerial crises give ephemeral Ministers no time to assume authority as heads of departments. How much more difficult must their task become when they are compelled every day to waste their intellectual strength on so many Parliamentary units?'[1]

The truth is that the Commissions have discovered, by accident, an outlet for the repressed ambition of the ordinary member of Parliament, and have proceeded and will proceed to the point where something forcibly stops them. They can hardly be blamed for desiring not to be merely voting-cattle. Their practices, however, while they have the effect of controlling administration, go too far, for they are not as continuously interested, so closely concerned or as responsible as the Minister, yet he is liable to constant interference and criticism of a dangerous nature. The Commissions have of late secured jurisdiction over 'motived' interpellations which do not get to a vote when they are preceded by 'pure and simple interpellations'. They report upon such 'motived' orders if the Chamber wishes. On the whole, French control of the Executive is too interfering at some points, and non-existent at others. It is destructive rather than corrective. But a proper fusion of the methods of the House of Commons and of the Chamber of Deputies offers a feasible way of improvement.

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Germany follows the same general mode of Parliamentary control of the Executive as France. Questions,[2] however, 'small questions' as they are called, must be endorsed by fifteen members, and are answerable either in writing or orally during one hour of one sitting per week Interpellations need the endorsement of thirty members,

[1] Article cited, *Empire Review*, pp. 308, 309.

[2] G.O., Arts. 60, 61, 62.

and must be concisely and clearly drafted. Ministers set the date of discussion, and if they refuse to answer altogether, or for more than a fortnight, then the Reichstag can put the interpellation on the Order of the Day. The interpellator is permitted an explanation of his question, and thereupon the Minister replies. But only if fifty members request a debate, does one follow. Further, if a resolution is to follow upon the debate at least thirty members must support it, and as many members can demand that the resolution be examined by a Committee before a vote is taken. If the interpellations are so many as to endanger the due completion of business, the Reichstag can limit the interpellations to special days. It will be seen that the German system sets certain limitations upon the minorities which can hold up Ministers. The limitations do not appear to be too severe. Virtually, the Rules say that only in matters which are important enough to find thirty who object can the Reichstag be troubled with their discussion, and this seems to me to be more reasonable than the French practice, which though ideally splendid and democratic down to the meanest of individual members of the Chambers, makes democracy a farce by stopping publicly beneficial government for the benefit of the ambitions and vanity of deputies.

Committees for Foreign Affairs and Recess. The Reichstag Committees are also continuously in touch with administration, but by no means so fussily as the French Commissions. There are two Committees mentioned in the Constitution whose theoretical interest is very great, and the experience of which is worth a little attention.[1] We observed that however efficient parliamentary control is, there is still a portion of every year when there is no control at all. For this all Ministers thank God. The makers of the German Constitution sought to overcome the cause by providing that a Standing Supervisory Committee ('to safeguard the rights of Parliament') should function during recesses. Its number was fixed at fifteen, and later (1925) at twenty-one, and later still, twenty-eight; it is composed of members of the various parties. It has not sat continuously, but occasionally, in the recess, and has confined itself to the discussion of the most serious events of the day: e.g., state of emergency in Bavaria, increases of salaries in the Civil Service, execution of the law relating to the Defence of the Republic, financial guarantees to certain business undertakings, application of the budget surplus to the aid of agriculture injured by storms, various statutory orders of importance. This seems to me to be an important institution, especially as it does not worry the Government continuously. It is enough if the Government is aware that a representative of Parliament is existent to raise any questions where deficiency or critical innovation is concerned.

[1] Arts. 34 and 35.

The second Committee which finds mention in the Constitution is the Permanent Foreign Affairs Committee. Its institution is the direct result of German democratic dissatisfaction with the secret conduct of foreign relations, and the widespread belief, that if only the people are consulted, war will not lightly be undertaken or produced by unwise alliances and engagements. This view is extensively held, though it is very doubtful whether improvement is possible in the present stage of human greed and popular morality and wisdom. However, one thing is certain, that publicity of diplomatic negotiations is the first stage in preparing the mind to face the issues and so, perhaps, to change the present condition of international and domestic political morality; and to this end the ratification of treaties by Parliament and the supervision of foreign relations by a Committee of Parliament are necessary steps. America, as we have already shown, has both these institutions; France has both these institutions, but still permits secret alliances; in England, the making of treaties is still considered to be a part of the royal prerogative by the Conservative Party, not needing ratification by Parliament, though this may be permitted, as of grace, to discuss treaties, while the Labour Party submits treaties and presumably would abide by a Parliamentary vote—yet no Foreign Affairs Committee exists although many people have demanded it. In Germany a Standing Committee for Foreign Affairs, now consisting of twenty-eight members, exists. Its sessions are, like those in France and the U.S.A., not open to any one else except members of the Committee. It sits very often and hears Ministers on current negotiations, or events which affect or are likely to affect the Reich.[1] This means that at least twenty-eight members and their substitutes and parliamentary friends are in touch with the march of events, and are able to raise an alarm when necessary, and further, that Ministers realize that there is a watchful committee, including members of the minority, which requires a good reason for each stage in policy. It has been pointed out[2] that the Committee is often faced with an accomplished fact because the Government negotiators have to make binding engagements. In spite of this the mere presence of the Committee and the need to answer its questions must work in the direction of controlling the mind and activity of the Minister. The Committee continues between Parliaments, as well as between sessions.

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In the U.S.A. there is almost no parliamentary control of the Executive. The very basis of the Constitution is that each branch of government shall go its separate way, and the Executive finds no place on the floor of the House or the Senate. Yet we have seen

[1] Poetsch-Heffter, *Jahrbuch*, XIII, 80. [2] Freytag-Loringhoven, op. cit.

that some attempts have been made to make the twain meet—in the Committee stage of bills, and in the relationship between the Congressional leaders and the President and his Cabinet. Yet these are not enough to satisfy Congress, and it has proceeded to control by voting the Estimates in very great detail, by passing many Acts regulating the departments and their functions in very great detail, by discussing and voting detailed resolutions[1] recommending certain lines of policy, and finally by conducting investigations.

The only inquisitorial method of supervising the Executive lies in Congressional Investigations, the method which, broadly, has been considered by all Parliaments as the very heart of their powers of control, but which, in countries other than America, form only a part of their apparatus of control.[2] Congressional investigations appear to have no constitutional basis excepting as an implication of the legislative power of the Congress, for the attempt to legislate or to grant and control the expenditure of money without first finding the facts is unreasonable.[3] Such a difficulty does not arise in the British political system, for Parliament is not a body granted limited powers by a written constitution. Whatever the constitutional power of Congress, it has certainly cast its net of investigation very wide and deep,[4] and in some cases, like that of Teapot Dome, has unmasked real villainy. Yet the procedure is occasional, not continuous, cumbrous and very slow. It may be put off by party pressure when it is most desirable, and it cannot be used for manageable, everyday control. When it does come the actual hearings develop almost into a prosecuting criminal inquiry,[5] or as Walter Lippmann has said, into a 'wild and feverish man-hunt in which Congressmen do not stop at cannibalism'; and, after report, there is no guarantee of improvement: for Legislature and Executive, being separate, tend to become hostile, and refuse to take each other in good faith, so that on the one side it is right to lie, escape investigation, impute personal motives and ignore recommendations, while on the other it is permissible to be spiteful and maliciously inquisitorial to no public and practical end.

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[1] This is very largely why so many resolutions are passed by Congress: it is the American manner of guiding the Executive which has no organic connexion with Congress.

[2] Cf. German Constitution, Article 34: The Reichstag has the right, and on the motion of one-fifth of its members the duty, to establish Committees of Investigation. Cf. Poetsch-Heffter, *Handkommentar*, p. 179.

[3] Cf. *Harvard Law Review* (1924), Vol. 38, p. 234; cf. especially the opinions in *McGrain v. Daugherty*, 273 U.S. 135; Galloway, *The Investigative Function of Congress*, *Am. Pol. Sc. Review*, Sept., 1927; and a comprehensive study by Dimmock, *Congressional Investigating Committees* (J. Hopkins Univ. Studies, 1929).

[4] Cf. *Cong. Record*, 65th Cong. (15 April 1924), p. 6363; Dimmock, op. cit. (57), calculates 330 investigating committees since 1792; Galloway, op. cit., 285.

[5] As, for example, the Democratic Inquiry into Blaine's dealings in Little Rock Stock in 1876. Cf. Thomas, *Return of the Democratic Party to Power*, cited above.

The Effectiveness of Administrative Control. How effective are these methods of control? On the whole, I think it must be said that control is of small importance, if our standard is that which is to-day necessary and possible. (The present situation compared with the monarchical eighteenth and nineteenth centuries is, of course, remarkably effective.) Why is this? Generally, all countries suffer from the small amount of time available compared with the vast apparatus which comes under supervision. They suffer, too, from the lamentable ignorance of private members. It is a crass and devastating ignorance, a terrible ignorance, an ignorance incredible until one comes up against it personally. How can these men and women possibly know enough to control the equivalent of a nation-wide industrial or commercial undertaking without a continuous professional study of the issues involved? Modern States suffer, without any doubt, from the members' lack of interest in the details of administration excepting when a detail happens to concern the interests of their own constituency; the whole democratic process as we now know it is based upon the sensational, and only a very few members are pedantic or conscientious enough to give themselves, without electoral reward, to unseen toil among routine and details. The whole process is so casual and amateur and happy-go-lucky. In France the interpellation is far too frequent and dangerous to the life of the Government to be considered a good method of control. It harasses and annoys, and further, it is used as much to embarrass the Government for general political and personal reasons as objectively to cause an improvement in the concrete details of administration. In the United States the Legislature and the Executive are too far out of touch with each other for the Legislature to be of much use in controlling the Executive, and the constitutional organization of hostility has only too well succeeded. If we consider, then, the deficiencies of parliamentary control over the executive in the modern state, we come upon the rules which should guide a better arrangement. A continuous touch must be maintained between the two, interest in the work of the executive must be stimulated, sufficient time must be somehow made available for members, and, if they cannot acquire a comprehensive knowledge, they must be enabled to obtain at least a sufficient knowledge of one or two specific branches of administration. They must deny themselves the pleasure of undue participation and leave that to the *clearly* responsible and removable Minister aided by his scientists in the departments. This, I think, leads to the creation of committees of the parliamentary assemblies for the special purpose of contact with the executive. We will return presently to this suggestion, when we have considered the problems of parliamentary congestion and devolution.

CHAPTER XX

PARLIAMENTARY DIFFICULTIES, AND REFORM

CONGESTION AND DEVOLUTION

THERE is no doubt that the present arrangements in Parliament both for legislative and administrative control are sadly antiquated. In this respect the British Parliament is worse off than other parliaments, though these, too, suffer from the prevailing disease. For either they get most of their work done by committees, in which case the full assembly is less congested, or, added to this, sometimes they are federal parliaments which have not such a wide range of work to accomplish. The problem, therefore, of relieving parliament is one which more particularly concerns Britain than any other country and this problem is worth a short discussion. Before we enter upon this discussion let us remember what our analysis has so far revealed, namely, that parliaments of to-day play a much smaller part in the government of the modern state than was anticipated by the originators of democratic theory, and compared with their status and power even fifty years ago. They are less the creators of policy than its registrars. They have become the ultimate court of appeal in matters of legislation and administration rather than the regular and original thought-organization: the keepers of the sealing-wax. Instead of making policy, they only either acclaim or question the work of a score of leaders. This is so because, on the one hand, the sheer quantity of the work to be accomplished is overwhelming, and, on the other hand, the expertness now required for the purposes of government is hardly to be found in proper quantities or proportions in parliaments based upon territorial constituencies and chosen by the processes we have described. To deal with the problem of quantity, the remedy of devolution has been suggested; to deal with the problem of expertness, the creation of parliaments based upon vocational membership has been urged, and in some countries adopted. Let us examine the theory and practice of these remedies and see how far they are feasible and useful.

Devolution. Devolution is the remedy devised to relieve Parliament and the Cabinet of their surplus of legislative and supervisory burdens. There is no doubt about the congestion of these bodies

and of the accessory evils which follow, nor that the direction and character of modern tendencies are certain to cause an even greater congestion. We have already seen that Parliament has been forced almost into the position of a merely automatic registrar of the actions of the Civil Service, that the private member is too overburdened to be able to surmount his difficulties, that debate must be stifled if the minimum of necessary business is to be concluded, that officialdom is uncontrolled and millions of pounds voted without any parliamentary examination whatever, that ministers are not put sufficiently upon their defence to cause them to re-examine their own actions with an anxious vigilance. Since 1880, Cabinets have been far too numerous and busy to act with deliberation and wisdom, and in more recent years the burdens of the separate Departments and of the business which necessarily demands collective counsel have so accumulated as to make such counsel a farce.[1] In spite of the measures taken to re-equip the House by closure and the development of the Committees, the main evils persist, and have, indeed, been aggravated: laws of first-class importance must continually be deferred, and the House still operates under conditions of paralysing pressure.

The problem of devolution was first raised, in a serious degree, towards the end of Gladstone's career, and to him it implied the transfer of certain powers from the full House to Committees, and a beginning was then made with the Committee system. Further, about the time of the County Councils Act of 1888, which created the Administrative Counties and the County Borough Councils, it was argued, and that Act provided,[2] for the transfer of suitable central functions to these bodies. Nothing, however, was done. Meanwhile, the Irish demand for Home Rule raised a new issue altogether: that of transferring substantial functions to the 'national' areas of Ireland, Scotland, Wales and England, and the Irish artfully attempted to win support for their own cause by playing upon the separatist feelings of Welsh and Scottish members.

Since that time theory has developed in three directions: (1) national devolution or 'Home Rule all Round', (2) Regionalism, and (3) Procedure Reform.

The national solution, which culminated in the Report of the

[1] Compare the difficulties regarding the Government's treatment of unemployment and the almost complete neglect of this subject in the early months of the Labour Government of 1929 by the Prime Minister, who was preoccupied with the London Naval Conference.

[2] Cf. Redlich and Hirst, *Local Government in England*, I, 197, 198.

Ritchie (President of the Local Government Board) moving for leave to introduce the Bill said: 'I believe . . . there is a real and substantial demand for a system of decentralization by which many of the duties now performed by Central Departments, and in some cases by Parliament, might be entrusted to County authorities, if they were constituted in a manner which should adequately represent the public' (19 March 1888, *Hansard*, Vol. CCCXXIII, col. 1642).

Conference on Devolution,[1] is that certain services of non-Imperial width shall be given over completely to governments in the national areas. Scottish propaganda contemplates complete Home Rule.[2] The Report of the Conference recommends the devolution of (i) Regulation of Internal and Commercial Undertakings, Professions and Societies; (ii) Order and Good Government; (iii) Ecclesiastical Matters; (iv) Agriculture and Land; (v) Judiciary and Minor Legal Matters; (vi) Education; (vii) Local Government and Municipal Undertakings; (viii) Public Health Matters.

(1) **Difficulties.** These difficulties, however, arise:

(*a*) The more important of the services like labour legislation, public health, education, power development and transport, are incapable of administrative bisection or trisection without great loss, since their nature demands uniform regulation over the widest possible area; and Great Britain is already a very small and close-knit unit.

(*b*) Some of the services cannot be separated from continuous co-ordination with the Imperial Departments of Foreign Affairs, Trade and Customs, without international and domestic difficulties. For example, international trade and labour conventions must be accepted by the whole area, yet under devolution, especially 'national' devolution, uniform acceptance and application by the areas is uncertain, and its command may cause acute controversy. There would be less difficulty where the national Parliaments were groups of members appointed from the Imperial Parliament, and great difficulty or the presumption of difficulty, if the Parliaments were separately elected and happened, one or all, to be of different political party from the Imperial Parliament. Problems of enforcement would be difficult, in the case of a 'national' area, for a different psychology would then prevail than does now prevail when the Ministry of Health threatens a local authority with *mandamus*, or to act in default, and even now these threats are rarely used and even more rarely executed.[3]

(*c*) The financial difficulty is of fundamental importance. If the 'national' revenues are wholly or partly provided by the Centre, the Subordinate Parliaments cannot avoid the interference and superintendence of the Imperial Parliament, and this will mean friction between them, and expenditure of the Imperial Parliament's time in review of the conditions of the administration of the grants. That is the lesson of the grant-in-aid system in every country. If the 'national' Parliaments are told to find their own revenues one question arises which is difficult, and another which is impossible, to solve: what

[1] Cf. *Conference on Devolution, Report*, 1920, Cmd. 692, for detailed list of services.
[2] Cf. *Home Rule for Scotland*, pamphlet of the Scottish Home Rule Association, Hope Street, Glasgow.
[3] Cf. *Royal Commission on Local Government*, 1923, *Minutes*, Part I, para. 139, and *2nd Report*, 1928, Cmd. 3213, p. 65.

new taxes can be invented of sufficient amount? If, on account of its superior equity, an income tax is raised, would Scotland and Wales be able to find the amounts necessary for their own services? It is exceedingly probable that this second question would be answered in the negative, for there is little doubt that the brunt of financial burden is borne by England. But financial burdens of this kind are borne, so the experience of federal states teaches us, only when there is an undisturbed sense of national community in the state: destroy the national feeling, and there at once appears to be no reason whatever why one part should submit to taxation for the benefit of another part.[1] And, indeed, 'national' devolution would very probably have this effect in the long run.

(*d*) No distribution of powers can be sufficiently detailed to satisfy the claimants, or avoid varieties of interpretation; nor, more importantly, can it foreclose social development which will raise questions of the location of authority. A court of appeal to decide constitutionality is inevitable. Now this difficulty may be over-emphasized, for experience of judicial review of constitutionality in the U.S.A. is apt to be the one criterion in this respect. But the difficulty in the U.S.A. arises not principally from the Supreme Court's power to decide whether a function belongs either to the State or the Union, but whether it belongs to either of them at all. In other words, its most challenged and onerous power refers to the limitations upon any government whatsoever imposed by the Bill of Rights. Yet we must admit that a difficulty still remains, which may and often does arouse ill-feeling between States and Union; for such a situation arises under the Australian and Canadian Constitutions.[2] Nor is the function one which increases respect for the ordinary judicial work of the Courts.

(*e*) A power granted for one purpose may come to be interpreted and used for something entirely different. For example, health powers like quarantine may come to be used as an embargo on imports, exports, or the migration of workers; and a power to tax may be used by either Imperial or National governments to destroy each other's schemes and instrumentalities.

These are serious problems to face, and we have already seen how difficult is the functioning of a Federal system. Moreover, Federal experience teaches this, that the nature of services in the modern state presses inexorably and successfully towards centralization, and this in countries of an area from five to thirty times the size of Great Britain. Only if the sickness of Parliament cannot be otherwise abated are we justified in contemplating steps leading us towards such problems; and it would seem better to patch up the patient

[1] A case in point is the position of Prussia in the German Republic. Cf. *supra*, Chaps. IX and X.

[2] Cf. footnote to page 229 *supra*.

and move lamely than to put him into such a collection of splints that he could hardly move at all. So that the question is this: are Parliament and the Cabinet so irremediably congested that these difficulties can be accepted? It is a quantitative problem, one of a balance between difficulties and advantages; and the most trying fact of all is that we have no way of measuring exactly enough the elements involved.

The conference on devolution presented two schemes: the Speaker's and that of Mr. Murray Macdonald, a pioneer and devotee of devolution. The latter was one of complete devolution, establishing legislatures subordinate to, but separate from, the Parliament of the United Kingdom, for England, Scotland and Wales respectively, and elected independently of the United Kingdom. The Speaker's scheme sought to avoid separate elections for the subordinate bodies. It recommended for England and Scotland and Wales Grand Councils, consisting of a Council of Peers and a Council of Commons, the latter to be composed of all the members returned to the House of Commons to sit for the constituencies in that area. It may be criticized for its complexity because it charges the same people who are elected as representatives to Parliament with control and management both of their local Grand Council and Central Government interests. The effect on the electorate could hardly be helpful.

(2) **Regionalism** is nothing other than devolution to locally-elected bodies in large, non-national areas, coincident with certain districts on which industrial, commercial, agricultural, transport and social factors impress a unity of interests.[1] Here it is enough to say that its merit is its recognition that nationality is not necessarily a principle of legislative and administrative efficiency in the territorial distribution of services; and that considered as a contribution to parliamentary difficulties, it is too small to be anything but a minor incident in a greater reform, for the services which could be regionalized would save practically no time, while those which would save time could not possibly be regionalized owing to the paramount necessity of national uniformity.[2]

(3) **Procedure Reforms.** Procedure Reforms can do little to relieve the Cabinet, but much to relieve Parliament. The principles of good legislative procedure seem to me to be these: (*a*) reference of the principles to the people, as a body, and to the sectional interests immediately concerned; (*b*) careful discussion of the details by authoritative institutions in order to give law the benefit of expertness

[1] See e.g. Fawcett, *The Provinces of England*; Desthieux, *L'Évolution Régionaliste* (1918); Charles-Brun, *Le Régionalisme* (1911); Brecht and Kutzer, *Neuordnung der Dezentralisation im Deutschen Reich* (1928).

The subject is to be dealt with at some length in a forthcoming book on *English Local Government*.

[2] Cf. *Economica*, 1925; a 'Note on Parliamentary Time'.

and the stamp of authority; (*c*) publicity of discussions; (*d*) the greatest measure of agreement between the Government and the Opposition as to the distribution of time and in regard to amendments, since the complaint of party tyranny should be reduced as far as possible; (*e*) the member must be interested in government by significant work and liberty to speak, educated by close contact with officials and Ministers, and not injured in health by late hours and overlong sessions. *This system implies first and indispensably the abolition of the idea that discussion and resolution in the whole House is necessary to everything contentious.* Unless this principle, which does not exist on the Continent or in America, is removed from the very centre of English parliamentary institutions, there is no remedy for the sickness of Parliament save in the tangle of Devolution. The electoral process and the parties already settle the main lines of legislation, and roughly the question of priority, and with time they will become better organized than now. The instruments of publicity and discussion have effectively made the British Constitution plebiscitary. Interests are consulted; the tendency is towards more systematically organizing their consultation: that is not a difficult problem, and may be solved along the lines of group representation on Departmental Advisory Councils and on Commissions of Inquiry, or/and through a Central Advisory Council, to which suggestion we revert presently.

What is there left for Parliament to do? Not to make the law—the elections have already determined that; but to examine and revise it for the removal of injustices unnecessary to the nature of the law. Yet, if we consider the spirit of the Three Readings and the theoretical limitation of the Standing Committees to non-contentious business, we cannot deny that there is much in them reminiscent of the opposition, not of one group of members to another, but of the Whole House against a despotic monarchy. It is the procedure of *the People against the Crown*, not of a *Parliament* proceeding from the people. The principle of a bill is no longer determined in the House but in the Country: in the House it is only discussed, not decided; and even discussion has been reduced by the pressure of the majority from outside the walls of Parliament. Is it not time to accept the situation that neither the Opposition nor the Government can be budged from their position, excepting on small points?—that there is considerable absenteeism, that members vote without having heard the arguments, that Parliament is compelled to drag on down into August and meet again in Autumn so that members are prevented from doing the only things which to-day can give them power and efficacy: visiting their constituencies and studying the documentary and human sources of government? The proper place for Parliament's work is in Committee; and there the real work of discussion

should take place. The general discussion of one half-hour each for Ministers and Opposition should serve to introduce the Bill to the Country, and then the work of the Second Reading and Committee stage and Report stage should be lumped together in Committee. The Committee stage should be open to the public, and should be as fully reported as the Parliamentary Debates are at present. The draft and the reports should be before the House for at least three days before the Main Debate comes on. This Main Debate would be closured by an all-party Allocation of Time Committee of the House, in which the Government, of course, has the last word. The Bill would then return to Committee for style and consistency, when expert draftsmen would be present. The saving of time results from the transfer of the burden to eight or ten Committees which can work simultaneously; and publicity is still amply provided for in the reports of Committee proceedings and the Main Debate. I should estimate that such an arrangement would save about one-half the time of the House, permitting either a doubling of its legislative output or the use of its time for other things: increasing the days spent upon supply, adding another thirty or forty to the oral questions, and allowing more time for discussion of administration and emergencies. The Committee stage would follow very much the general procedure in the French and German Committees, with special reference to hearings of the authoritative public groups, and Commissioners appointed by Ministers.

Towards a Professional Politician. What are the difficulties in such a scheme? The chief, if we follow present experience, is absenteeism of members, and the overloading of Ministers; both are diseases of all modern governments. Absenteeism is partly caused at present because members are useless in the full House, there is too little real decision to be taken at Committees, they are interested mainly in the fun and excitement of getting elected and enjoying the prestige of membership, or they have professions or businesses to attend. It seems to me that the House has the right, as a public authority, to command regular attendance save for reasons of illness or sudden contingencies. To demand this, however, is to arouse the criticism that this would necessarily exclude from the House men whose minds are valuable and fresh, but professionally occupied,[1] and to vest the privilege of government in professional politicians who do nothing else but govern. This is a valid and important criticism: but how does the House work at present? The most constant cry is that it is gagged: that it does nothing except register the work of the Cabinet and the Civil Service. There is no good without a sacrifice to obtain it, and the alternative

[1] In fact the sessions are arranged at a late hour for the benefit of professional men, mainly lawyers who complete the bulk of their work in the morning hours. So also in France.

to a Parliament of amateurs who complain that they have nothing to do, is a Parliament of full-time, or nearly full-time, members, who, because they are full-timers, can stand the brunt of the necessary work. Why everything else in society should be rationalized by reference to the utilities of the modern world, and the House of Commons left in a condition which is deplored by its disappointed and disgusted members and constituents, and which is a proven impediment to the generally accepted objects of civilization, is a mystery which can only be answered by the reflection that average men rarely build a new machine unless disaster immediately impends, or that they are too stupid to realize that an improvement in organization may win them as much social welfare as the discovery of new oil-wells or the acquisition of another colony. For the intangible is interpreted as the non-existent. Further, if the pressure upon 600 members were too great, there is nothing of serious meaning to be said against the increase of the membership of the House to 800 or even 1,000. This would give more latitude to the members, and have the incidental advantage of decreasing the size of constituencies. The mind is shocked at the suggestion for 1,000 members of Parliament, only because their present quality is so poor. In any case, the pay of members should be withheld for unpermitted absence, as in Germany,[1] where the practice has counteracted absenteeism.

The Ministerial difficulty is more serious: the routine of the Department, Cabinet Councils, electoral obligations, ceremonial functions, engages a tremendous amount of the Ministers' time, and the question is whether the Minister would have time and energy for all those things and appearance before Committees also. But Ministers already appear before the full House and Committees, and the extra work necessary would not be so great that judicious devolution to Under-Secretaries would satisfy the conditions.

Now the Committees suggested could be used not only to relieve the House of legislative burdens, but could be used as its counterparts for administrative sessions, when Departmental policy and administration would be under discussion for questions, information, and debate. Further, an affirmative resolution of the appropriate Committee ought to be demanded for all Statutory Rules and Orders save those which are of the nature of forms only involving a small amount of technical discretion, and even these should be tabled for challenge.

It seems to me that a Committee system of this kind, with the Committees normally possessed of jurisdiction over the scope of one or two cognate departments, would give the conditions for a greater

[1] Article 40 of the Constitution together with 25 April 1927 (R.G.Bl., II, 323), amended by Law of 27 December 1929 (R.G.Bl., II, 762): the daily rate of pay is subtracted for every absence without leave from sittings of the House.

quantity and better quality of work: specialism; continuity of interest and acquaintance with a limited and masterable field; colleagueship; more scope for speech; the genius of place which rules out irrelevance, tedious repetition and electioneering;[1] and the possibility of obtaining adequate information. Further, the members could be helped by the availability of a library based on their field of interest, and a librarian and staff to do work for them similar to that done in the American Legislative Reference Bureaux. Finally, the work of the House should be summarized weekly in a Bulletin distributed to all members and available for purchase by the public, giving an account of the state of Parliamentary work and a programme for the following week.

All this is a large break with tradition, but let us remember that when the House has discovered a thing to be necessary and has suddenly been forced to accept a breach of tradition, members have very soon come to admit the necessity and forget the tradition—the best example is the Closure.

In France there is also complaint of congestion although the Committees relieve the House; further, social reform on the English scale is not attempted. The complaint is not so serious as in England. Though the House does not sit for long (four days per week), it over-satiates itself with debates on finance and administration. In Germany the Federal authority has a large field of competence, and social reform is earnestly pursued, yet the burden is not as heavy as that in England, and further, the Committee system, and the help of the Reichswirtschaftsrat and the Reichsrat reduce the pressure very considerably. The U.S.A. is a special case, and Congress, with its short sessions, law-manufacturing ambitions, 'log-rolling' for local advantages, and administrative interference by detailed legislation and resolution, suffers a pressure which is transferred to the Committees. The ultimate question is, 'Which are we to choose: antiquated procedure or that which is appropriate to modern utilities?'

The Cabinet is Overburdened. One question still gives pause: Procedural reform may satisfy the problems of the House of Commons. but can it solve the problems of a congested Cabinet? There, on the bridge, are a few men, who have to contend with the waves, the currents, the winds of society, an element more variable, incalculable, contingent, and uncontrollable than the sea and the heavens. What now? What next? Is this group clamant? Is that one satisfied? What trouble looms on the horizon? What nemesis is overtaking us? What is the conjuncture for such and such a month next year? Can we forestall a storm? If we use the power to disperse one cloud, shall

[1] This is the common experience of Committees in the House: Standing Order 19 is more invoked than in the full House.

we not be charging the atmosphere with another? No! The wonted classic simile of the pilot is inadequate to-day, for that at least assumed the constancy of the composition of water—but to ride *civilization*! The Cabinet is, indeed, overburdened: each Minister has more business in his own department than he can personally survey. How can he then be free to turn his mind to the subjects of collective discussion? This is the strongest argument for territorial devolution that now exists, and it has been suggested that appropriate reform lies in the direction of dividing the work of Parliament into parts—Imperial and Foreign and Domestic, the former to be managed completely by an Imperial Parliament and Cabinet, the latter by a Great Britain Parliament and Cabinet, each separately elected and with their own taxation resources. This scheme avoids the difficulty of dividing such services as health and labour administration, but it still has to meet the other difficulties adumbrated in our discussion of devolution to National Parliaments: the separation of certain British Departments like Labour from that of Imperial Departments like the Board of Trade and Customs, the financial difficulty, and that of judicial review of constitutionality and the problem of interpreting granted powers. If this scheme [1] were found to be necessary owing to clearly proven break-down of the Cabinet system after the procedural reforms, then it would be acceptable, but only under the safeguards suggested by our study of Federalism:

(*a*) The acknowledged sovereignty of the Imperial Parliament;

(*b*) The acknowledged subordinacy of the British Parliament;

(*c*) The acceptance by judges of the convention that their only duty was to decide between one Parliament and the other, but not against both; and that the guiding purpose of the function was to keep the Imperial Parliament free of matters for which its range was not appropriate, but always to give it those which were necessary and proper to its reserved powers and developing needs;

(*d*) The power of the Imperial Parliament to overturn a judgement of the Court by statute remains absolutely unimpaired;

(*e*) That all treaties and international conventions made by the Imperial Government are binding on the British Government with the ultimate right of interpretation vested in the Imperial Government;

(*f*) Neither the Imperial nor the British Government may tax each other's instrumentalities.

[1] I have in mind, of course, the proposals of Mrs. Webb in her Fabian Tract No. 236, *A New Reform Bill*. As I have tried to convey, the difficulty lies in the *measurement* of the gravity of existing defects. Is the gravity sufficient to warrant the risk of the difficulties inherent in her type of devolution? If so, or if not, *caedit questio*.

PARLIAMENTS OF INDUSTRY

1. The German Economic Council;[1] 2. The French Conseil Économique; 3. The Economic Advisory Council

An aid to the work of Parliaments has been sought in the institution of special bodies to advise upon legislation of first-class economic importance, and since the world is moving in this direction, the experience of Germany, and in a minor degree of France, is important. Why was the German Economic Council established? One must distinguish between long-period and short-period causes. Both the enduring and the merely transitory combine to produce an institution, but their support is unequal.

The first of the short-period causes was the very strong influence of Bolshevism in 1918. The theories were circulated in a very tense atmosphere throughout Germany, and the Left Wing of the Social Democratic Party made claims based on them. The second was simply revolutionary idealism, the desire to get away from the ordinary collection of democratic institutions and to create new machinery to realize various social ideals. Thirdly, various districts, particularly the Ruhr, wished, if possible, to escape the full political burdens of the War and the inevitable taxation, and claimed economic and district autonomy. Hence they demanded the creation of Economic Councils, each Council controlling a particular district.

The long-period reasons are very important, because they are urged in every great country involved in the complexity of our present-day civilization. Parliaments have not the requisite expertness to deal with the social and economic legislation of the present time. This has given rise to government by the Civil Service and the various interested groups, who, by means of deputations and lobbying, are able to set their imprint upon social legislation. Yet the Cabinet and the Civil Service have not the necessary expertness. Their training and selection do not conduce to insight into the detailed necessities of the various industries, or survey of the whole range of economic activity. A large part of modern government is concerned with the detailed application of general principles to particular cases, by rules and orders, and these, owing to the fact that Parliament has no time, frequently become law, and affect citizens, without proper revision. It was desired, further, to find a forum where employers and employees might meet, in the hope that this might mitigate the hostility between them.

[1] This account is based on my work, *Representative Government and a Parliament of Industry* (1923); on *Das Vorlaufige Reichwirtschaftsrat*, 1920–6, by Hauschild, Secretary of that body, on press cuttings kindly placed at my disposal by the division of the Reichwirtschaftsministerium concerned with Reichwirtschaftsrat, and an analysis of the proposals for the reform made in 1928: *Reichstag-Drucksache, IV Wahlperiode*, 1928, *Nummer* 348, *Entwurf eines Gesetzes über den Reichswirtschaftsrat und eines Gesetzes zur Ausfuhrung des Gesetzes über den Reichswirtschaftsrat.* Cf. also Glum, *Der deutsche und der franzosische Reichswirtschaftsrat* (1929), and Brentano.

Again, there was, and still is, a demand for consumers' representation. In England at the present time great efforts are being made to create a special representation of consumers. The same feeling was prevalent in Germany, and it was thought that the creation of an Economic Parliament would serve this end.

Further, the whole conception of majority rule was attacked, and attacked from two sides: the extreme Right and Left Wings of politics. On the Right Wing a number of people are lineal descendants of the school of the Romantic political thinkers, strongly hostile to the pulverization of the country into a number of free and equal voters, and convinced that actual social groupings, and the necessity for unity in the State, require that parliaments should be representative of *bodies* of people, of groups—handicraftsmen, manufacturers, agriculture and so on. They suggested that even if this were not a substitute for the majority principle, it might at all events be used as a valuable modification.

The Left Wing scorned the idea that there was anything real in a democracy based upon balloting once in four or five years. They derided the process of marking a ballot-paper as real participation in government. 'Ballot-box democracy', as they called it, was to them anathema because it neither educated the people nor permitted popular government. Further, in the last couple of generations the criticism has been levelled against modern industrial organization that the employees operating under a system of division of labour never really get the opportunity of seeing the whole productive process in which they are engaged, and this results in a deadening, monotonous life for them: that one must get as far as possible away from the effects of division of labour to a reintegration, which is possible only if the workers are given an interest in the final results of their labour, if they are given a say in the conditions of their work, if they are given an opportunity of meeting other groups and discussing with them and with the employers the general situation of the industry in which they are engaged. To this there was added, partly as a result of the War, partly as the result of the necessary extensions of State activity, a demand for what was called 'depoliticization' of industry, that is, the withdrawal of industry from the sphere of State control;—an attempt to keep politics out of industry, and of the captain of industry to escape from State control of his technique and enterprise.

Finally, there was the idea fostered by war economics, that the country should be consciously and rationally guided by one body so that economic forces could be best utilized. The term which preceded the one that has become so prevalent, namely, rationalization, was *Gemeinwirtschaft*—a 'common-economy'.

These various causes resulted in the creation of the Economic Council. It did not get into the Constitution without a struggle,

because Preusz, who drafted the Constitution, was a Liberal, of the *bourgeoisie*, and was interested mainly in the political, and not the economic, side of democracy. Consequently, his drafts contain all the experiments known to previous democracies, all the Liberal ideas of the French Revolution and of the Revolution of 1848, but no mention of such economic rearrangements. It was not until there were actual riots, conducted and led by the leaders of the Independent Socialists, that Article 165 was put into the Constitution. It runs :

(1) 'The workers and salaried employees shall be called upon to co-operate with equal rights with employers in the regulation of wages and conditions of labour and also in economic development in general.'

(2) 'For the protection of their social and economic interests workers and salaried employees shall be legally represented in Workers' Councils established for individual undertakings and also in District Workers' Councils grouped in connexion with economic districts and in Federal Workers' Councils.'

That clause gave rise to the Workers' Councils Bill of 1920, which established joint councils of employers and employed with rather more power than the Whitley Councils in England. The Article proceeds :

(3) 'The District Workers' Councils and the Federal Workers' Council shall combine with representatives of employers and other classes of the population concerned in the composition of District Economic Councils and of Federal Economic Councils for the performance of general economic functions and for the purpose of co-operation in carrying out laws relating to socialization. The District Economic Councils and the Federal Economic Council shall be so constituted that all important vocational groups shall be represented thereon according to their economic and social importance.'

Then follow clauses relating to the powers of the Councils and, in particular, the power of the Federal Economic Council :

(4) 'All Bills of fundamental importance dealing with matters of social and economic legislation shall, before being introduced, be submitted by the Federal Government to the Federal Economic Council for its opinion. The Federal Economic Council shall have the right itself to propose such legislation. In cases where the Federal Government is not in agreement with any such proposal it shall, nevertheless, be bound to introduce it into the Reichstag accompanied by a statement of its view thereon. The Federal Economic Council may arrange for any such proposal to be supported in the Reichstag by one of its own members.'

That, and one or two other clauses not strictly relevant to the subject under discussion, are the basis of this experiment in constitution-making. We proceed to discuss its implications.

Composition. The first was its composition. The method envisaged in the Article was somewhat as follows : that in the various districts—and by district is meant a certain local government area peculiar to the various states in Germany, not exactly equivalent to anything in this country, but a county may be taken as being

analogous—Economic Councils would be composed—how, one did not exactly know, and this gave rise to difficulties which have not yet been settled. A kind of pyramid was envisaged, resting upon a basis of Economic Councils in the districts, consisting, let us say, of employees and representatives of the free professions, the consumers sending delegates to the Federal Economic Council at the top of the pyramid. That Council might have been composed either wholly of delegates from the lower councils, or partly from them and partly from representatives of the various central organizations and the various industrial and social groups. As a matter of fact, owing to difficulties of composition and the necessity of quickly setting up the Councils, the question was shelved, and, instead, a quite different method of composition was evolved, which even now, when plans are being made for a final reconstitution of the Council, remains its basis.

The various great central organizations of economic and social groups were made the constituent bodies of the various representatives. This was simple; but close inspection reveals difficulties. Firstly, the difficulty of allowing for the proper geographic representation within the organizations themselves. If it were not laid down in the Regulations that the central organizations must have regard to the geographic distribution of their own industry, then there might not be true representation of the state of that industry in the Economic Council.

The second difficulty lay in the determination of the relative numbers of the various industries and groups concerned. Around that a tremendous battle raged Every group, as is natural with groups as well as with individuals, wished to be taken at its own valuation. Naturally, this valuation was tremendously in advance of anything like that which other groups were ready to acknowledge. For months and months a struggle ensued in which one group after another pointed, jealously, to privileges which were being granted to others, and produced evidence to show their own comparative superiority. The result was that, little by little, the Council which it was intended to keep below 200 in number gradually increased until, by the time every industry was temporarily pacified, there were 326 members.

Another difficulty was to make allowance for the manifoldness of various crafts within the Councils. Agriculture, for example, could not be taken simply by its numbers in the country, or by the proportion of the national product, which it annually contributed. It was necessary to have regard to the varieties of industry which were to be found within agriculture itself. For example, gardening, market-gardening and such things; little groups which, if taken in their proportion to the total population, it was impossible to represent.

Three principles were finally combined to determine representation: (1) numbers as shown in the production census; (2) an estimate of

the economic importance in terms of product, and (3) regard to the manifoldness of the nature of a particular industry. Thus some appear to be over-represented when considered from the point of view of number of population alone.

This point has important bearings upon the guild system as planned, but now abandoned, by such people as G. D. H. Cole, because if it is difficult to get representation in a body which is advisory only, how much more difficult would it be if that body were a final authority in the creation of laws binding on all? Then, of course, the struggle would be interminable, and it would soon be necessary to return to simple number.

Status of the Council. The Council is advisory only. It cannot prevent the Reichstag from making a law; it cannot force the Reichstag to make a law; it has no machinery for itself deciding which Bills are of fundamental importance and for compelling the Government to submit them; it has no machinery to compel the Government to send all Bills of importance to it in proper time for it to make its comments. It is advisory only; it is entirely a tool of the Government. It has its position in the Constitution, but as we know from a study of constitutions generally, unless there is a special body to guarantee the maintenance of the constitutional clauses, it is not possible to be sure that the body which is given certain powers will be able, in practice, to carry them out.

The Economic Council is concerned only with legislation of fundamental social and economic importance. The question is which body decides upon fundamentality and importance? The Government decides. The only thing that the Economic Council can do is to interpellate or question the Government why such and such a Bill was not sent to it. In fact, Governments have sent all Bills of importance, and many of secondary importance, in order to get the opinion of the Economic Council. The number varies from time to time. When the country is in a state of emergency few Bills are sent; when legislation has been necessary quickly, then, of course, the Economic Council has had short shrift. At other times it has had too much work. The main point is that it cannot itself decide; this depends upon the Government.

Members are appointed by the central bodies prescribed in the Decree which gives effect to the Constitution. Up to the present there has been no special term of office for members; they are eligible when there is a vacancy, and they are recallable when an organization thinks that its interest is not being properly represented. But that recall is conditional: it is addressed not by the organization to its representative but by the organization to the Government; it is the business of the Government to decide whether the motives for such recall are sectional in too selfish a sense, whether there is due

reason for the member to be withdrawn. Thus the Government is expected to mitigate sectionalism, yet not, apparently, where a representative *unfairly* subordinates the interests of his group to those of the general community. New proposals now suggest that when reconstitution occurs members shall be elected for six years; that is to say, at the end of six years there shall be a compulsory reconsideration of their re-election, and then, of course, it is fully within the power of the organization to recall them. Until reform, however, the present practice continues.

Although delegates represent their groups, there again appears the well-known clause that they are to represent the nation. The intention is to induce a state of national sympathy in the minds of representatives. The Decree says that they are not bound by instructions from any of the groups; but that is obviously to ask too much of human nature.

In a body of this description which uses Government documents, and is consulted in its Committees on confidential matters, which lead to measures to control particular industries, and to taxation, there is necessity for secret diplomacy. Consequently, the use of information obtained in these bodies is very stringently regulated. The more the State intervenes in industry, the more is it likely from time to time to threaten interests who may obtain information by being members of consultative bodies, and the problem of suitable regulation arises. In England and France, of course, the occasion upon which guesses and attempts are made to surprise the secrecy of the Government is the period preceding the Budget speech, and in the U.S.A. Tariff negotiations are a centre of similar interest.

Procedure. Since the Economic Council is an advisory body and its decisions are not immediately applicable to the citizens, it is not necessary that the majority principle shall prevail. Rather is it necessary that the full range of opinion shall be displayed; therefore, arrangements are made for voting both by head and by group, and the minorities in the various groups are permitted to give a minority opinion when they desire. For example, reference to a Report of the Economic Council on any subject would reveal, down one side, the various articles as provided by the Government, on the other side, the articles as amended and put in the form the Economic Council thinks proper. To each of the articles there is a commentary, and on each point a record of the votes. This means that the Government and the members of the Committees of the Reichstag are given a complete record of the opinion and voting of the various groups; a very important phenomenon. Two things need to be known: the main weight of opinion, and also the distribution of opinion.

Membership and Grouping. The Economic Council contains 326 members drawn from ten groups. Six of the groups represent

industry and agriculture and consist of equal numbers of employers and employed. Group 7 consists of representatives of consumers; Group 8 of officials and the liberal professions; Group 9 of twelve nominees of the Reichsrat (the Federal Council). This is one of the means of assuring geographical representation; the Reichsrat, as a federal body, is able to nominate special representatives from particular states. Finally, there is Group 10, nominees of the Government: twelve nominated in the free discretion of the Government, and such people usually are University experts in economics, banking, economic geography, and so forth. These people are said to have had a very good influence in debate, partly because their theoretical training conduces to breadth of view, and partly because they are not immediately interested. Their standards are those of the 'community'.

Effectiveness of the Work. In order to ascertain the real effectiveness of the Council it is necessary to refer to the drafts of the Bills as they were worked out by the Ministries; consider next the Committee discussions of the Economic Council and the various votes; ascertain the effect of their draft and commentary on the Government Bills, and then see how far the Reichstag accepted and how far it rejected the advice. On the whole such a study reveals that if the Government is satisfied, the Reichstag is almost entirely satisfied; that a Government project which has received the assent of the Economic Council and of the Federal Council constitutes with very slight amendments the Act as it is finally passed. Of course, there are amendments, but the ultimate question is: How far is the expertness of the Economic Council of effect in the making of law? It is of tremendous effect, excepting at the margin where the moral issue arises: where, when all the necessary information is present, and all points of view are expressed, it still happens that, nevertheless, the majority prefers its own view of the spiritual values. That is an unavoidable point in all law-making; and expert councils simply increase the field where evaluation is possible in quantitative terms, and reduce that in which moral absolutes dominate the decision, fact or no fact. However, in connexion with various laws, the Economic Council has been a complete success. The following represents some of the legislation in which it has been concerned: reparation problems (it elaborated the application of the Dawes plan), the resolutions passed by the International Labour Conference at Washington regarding hours of labour; measures relating to railway rates; the regulation of the potash industry; the organization of Imperial waterways and harbours; the working out of the new measures of federal finances; maternity aid and care; sickness insurance; industrial arbitration; the creation of a department of wage statistics; the establishment of advisory councils in railway administration; domestic labour and pay; housing; hours of labour; and, in more

recent times, the tariff rearrangements of 1925; arrangements for settling the terms upon which the depreciated currency shall be brought back to a sound basis, a law of tremendous social consequence. Inquiries into the textile and the leather industries and the conditions of the alcohol monopoly were conducted; similarly, in regard to the manufacture of matches and the whole problem of unemployment insurance. In all these cases, and many others, the Bill has gone before the Economic Council, has been considered in very great detail and commented upon, with very great effect. In fact, the tariff arrangements and the arrangements regarding depreciated currency were almost, word for word, taken from the Economic Council and passed into law. From time to time the Economic Council has taken steps to initiate legislation by inquiries and the passage of resolutions.

Constitutional Development. Since its establishment a very great and significant alteration has occurred in its constitution. It was originally thought that there would be a parliament in which 326 people discuss their subjects in full assembly, as in the Reichstag and other parliaments. As time went on, however, it was shown that for the business-like quantitative work which had to be done, the real work had to be done in Committee. In the first place three Committees known as the Chief Committees were created—the Economic-Political, the Social-Political and the Finance-Political Committees. Numerous Sub-Committees and Working Committees dealt with detailed problems, and at one time there were over fifty Committees functioning simultaneously. In the first year there were a large number of full assembly meetings, in the second year less; in the third year one or two; and since 1924 there have been none at all. The work has been done in the Committees, and Committee reports have been taken as the reports of the Economic Council.

Reform Proposals. This is a very significant evolution. So good has the system proved that it is to form the basis of the final constitution of the Council. It is no longer intended that there shall be a parliament of industry in which matters are discussed across the floor, for it was found that where such discussion took place it was controlled by general political considerations. In a large assembly with the objective, the quantitative attitude discarded, there is an approach to the kind of demagogy for which parliaments are more famous; members begin to speak to the public beyond the walls instead of attempting to meet metrical subtleties with their like. The Committees took over the work, and it is now intended that they shall form the basis of future development.

The workers, the employers, and the rest of the groups, including the consumers, actually fell into three divisions; that is to say, the

group-division tended to become less important than the great interest-division, the class-division. Frequently, before discussion took place in Committee, the attitude of the division was decided, and representatives were instructed to discuss matters on the lines laid down.

Present proposals are, that instead of 326 regular members, there shall be *two classes* of members; about 110 permanent members, and a fluctuating number of non-permanent members. With 110 it is possible, occasionally, to have full meetings, but this is not conceived as being in any way part of the normal work of the Council. The main work is to be done in Committee. The Committees will, from time to time, require extra members as experts. It might be that even with 110 it would not be possible to get a sufficient representation both of interests and of disinterested experts. Therefore, a panel is to be created of all the great organizations which ought to have representation, that panel being revised every three years, and any Committee, which, in the course of its work, thinks it necessary to call upon representatives of other interests or on experts, can do so by an agreement with the presiding body of the Economic Council.

This is an innovation, and it seems to me a very valuable one. It means economy of time. There is, as a matter of fact, in all parliaments a tremendous amount of absenteeism. Better therefore to compromise with these necessities of human nature. The best experts, after all, and the representatives of interests, must attend to their work, unless they are to be cut off entirely from their groups, and therefore fail in terms of representativeness. And already in Germany there is the criticism that the tendency is for the actual workers and men of industry and business not to attend, but to send the secretaries of their organizations. Under the present system, and since the inception of the Economic Council, it has been the practice to call in special experts when they have been wanted. For example, when the question of economic regions was examined economic geographers were brought before the Council and interrogated.

On the whole, it has been found that the Council is a very valuable part of Government although there is hostility to it in certain quarters. Its assemblies are not open to the public. Its Committee work is very private. Therefore there is not, as in the case of the Reichstag, a reverberating forum of political opinions, and as it is not heard, the democratic tendency is to ask why should it exist? There is, however, no doubt that the Government and the Reichstag have found it very useful both because of its expertness and because of the amount of time it saves to the Reichstag by its exhaustive examinations and reports.

There is much hostility from some quarters; first of all, from some of the members of the Reichstag. They prefer, as most members of Parliament do, to believe that they are the sovereign authority,

and that there is no limitation upon their work and will. Some of the bureaucrats are hostile. They do not cherish the difficulty of fighting through the clauses of their own draft and answering the comments of the Economic Council. They have to prepare the draft, see that it is put before the Cabinet, see that it comes before the Economic Council, before the Federal Council, and before the Reichstag Committees. All that is very laborious work; and nobody likes to be called to account.

On the employers' side there is much hostility because the workers have been accorded equality of membership with the employers. On the other hand, many of the more radical workers argue that they should be represented proportionally to their numbers, when, since they vastly outnumber the employers, the whole system would take on an entirely different character. Some demand that the present proportions of representation should be altered.

Then there are those who want to go much further and have an Economic Council which is not merely advisory, but which should actually be a second chamber in the legislative system, and have the right of veto and an initiative.

The principal supporters of the scheme are the great trade union organizations; but a great deal of latent opinion throughout the country supports the system.

The Sub-Structure. I observed that owing to difficulties of creating the sub-structure indicated in the Constitution, it was decided to proceed without it. Nevertheless, since 1921, both the Economic Council and the Government have tried to prepare an acceptable scheme for a territorial sub-structure of district councils. Two plans are before the public, but, owing to opposition, they have not been accepted. Plan A says that the smallest units shall be the Chambers of Commerce, of Industry, and of Agriculture. They are now almost entirely employers' organizations. It is said that on their side the workers themselves would set up Chambers of Labour, and then at a certain point each of these bodies might set up Joint Committees, from which there would be delegation right up to the Federal Economic Council, either wholly or with the addition of representatives from the central organizations. The employers wish to maintain their monopoly of the Chambers of Commerce, Industry and Agriculture, which in Germany have for generations held a position much more important than they occupy in England: in Germany they are official representative bodies, not merely voluntary bodies. They have the right of sending deputations and making comments and complaints both in local and central government affairs. They are the sources of information in certain branches of industrial administration. The workers ask why that privilege should be accorded to the employers and not to them?

Plan B urges that the Chambers of Commerce should be converted into Chambers of Industry or District Economic Councils at once; that they should cease to have an official character unless they at once include the employees as well as employers and representatives of other classes in the community—consumers, for example.

The Government plan (put forward in a project in 1928) [1] favours the formation of great economic regions, which will consist of parts of existing states or combinations of these parts. Each of these regions is to have an Economic Council, to meet at least once a year. It includes representatives of the official occupational bodies, that is, of the Chambers of Commerce, etc., and the trade unions and other occupational bodies—each equally represented, plus other associations admitted by the local constitution (such as municipalities and remains of municipalities, the free professions, officials, consumers' co-operative societies). Membership falls into three divisions: employers' representatives, workers' representatives and the rest. They are appointed and re-callable by the organizations. The Council must be consulted on important economic and social questions by the relevant state authorities, and may submit suggestions at will. They are to superintend the laws which call on them to do so. They are to elect one-quarter of the total membership of the Reich Economic Council.

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It is obvious that as a means of relieving congestion, inspiring the bureaucracy, giving expert help to Government and the Reichstag Committees, the Economic Council is a very important institution. It has not done everything which enthusiasts thought it might. For example, it has not caused employers and employed to become *fast friends, but who would expect that that would ever take place* in so acquisitive a society? It is an institution which has already been copied in France, and, on a small scale in England, in the Economic Staff Advisory Council. Despite everything which was said in England against the idea, we have been forced to it, and we will yet go further.

The Germans, in their experience of the Economic Council, came to the conclusion that there was sometimes necessity for inquiries wider than the boundary of any one of the Special Committees of the Council: for example, a general inquiry into the economic condition of the country. Therefore, they sent representatives to England to inquire into the way in which Royal Commissions operated, and I myself was helpful in defining their problems and course of inquiry. In the latest proposals for the final constitution of the Economic Council they have arranged not only for the ordinary committees, but, when necessary and at the request either of the Economic Council

[1] Part VIII, *No.* 348, *Reichstag Drucksache, IV Wahlperiode*, 1928.

or the Government, to set up a Special Purposes Committee (*Ermittelungsausschuss*), which will include several branches of other Committees and do its work on the basis of an English Royal Commission; have the same power in obtaining information and compelling witnesses to attend before it.[1]

The Germans, however, have maintained a feature in their Economic Council which is not provided by a Royal Commission, namely, a continuous body of experts. A Royal Commission in Great Britain, once it has reported, ceases to exist, and if explanation of any doubtful point in its Report is wanted it is necessary to run after the individual members of a Commission. The Germans build wisely, because their Council is always surveying the whole field of economic endeavour, surveys its own mistakes and the results of its reports, is present in its original form for consultation if difficulties arise, and it is the expected thing that the civil servants shall be in constant consultation with it.

France. The *Conseil National Economique* was established by a decree of January, 1925. Its advent was the result of at least two generations of academic and parliamentary discussion on the place of economic groups in the system of representative government, a special emphasis being placed upon the sterility of Parliament, the possible conversion of the Senate into a vocational body, the need for an economic regionalism in local government, and the strong current of syndicalism embodied for the moment in the C.G.T. and ancillary organizations. Increasing industrialization, Governmental intervention in industry, especially during the War, post-war anxieties, and the example of other countries, enabled more enlightened views to vanquish the cynicism, inertia and limited imagination of Ministers and bureaucrats. The necessary initiative was taken by Edouard Herriot (cf. *Pourquoi je suis radicale-socialiste*) and his Minister of Labour, Justin Godart. An extra-parliamentary commission, of mixed representatives, prepared plans (cf. Lautaud et Poudeux, *La Représentation Professionnelle* (1927)). The Report to the President of the Republic accompanying the Decree (*Journal Officiel*, 17 January 1925, p. 698), says that the Council was intended to be an organ established by the side of the Prime Minister, to 'study the great questions concerning the economic life of the country', particularly necessary (1) because individual departments are not sufficiently associated to control and develop national economic activity, and (2) because one must *always* have available the advice of representatives and special and technical experts, to obtain a synthetic

[1] Almost word for word the particulars the German representatives obtained regarding British Royal Commissions of Inquiry are to be found in the drafts of the final constitution of the Economic Council. This is a tribute to the English system of *ad hoc* Royal Commissions.

policy and avoid insufficiently co-ordinated decisions; to act as a forum of public discussion; to provide expert information for the departments, Parliament and others. The Decree defines the purpose of the Council: 'to study the problems of the economic life of the country, to find solutions, and to propose their adoption by the public authorities.' It is placed under the direct authority of the Prime Minister. It is consultative only. The Council is composed of forty-seven members: nine representing the population and consumers, thirty representing labour (intellectual, education, 'managerial labour' and 'salary and wage-paid labour'), and eight representing capital. They are delegated by their organizations for two years. It is to have at least four ordinary sessions per year, each lasting ten days. (A decree of February, 1926, amends this by leaving the permanent commission of the Council to call the meetings.) The Prime Minister is *ex officio* President of the *Conseil Économique*. The Council establishes panels of experts to be permanently associated (but not to vote) with it; and the principal Ministries send each two experts. The director of the secretariat of the Council of National Defence, the president of the Permanent Commission of National Defence, and the French representative on the Administrative Council of the International Labour Office may participate. Further, any economic group not represented permanently may be permitted to send representatives to participate in deliberations which concern it. All Ministers, under-Secretaries of State, commissioners, and the competent Parliamentary Commissions may be represented before the Council, and the Council may demand a hearing before the Parliamentary Commissions and Ministers and request their attendance. The Council makes reports and recommendations which are published in the *Journal Officiel*. Recommendations must be voted by two-thirds of those present. All laws of an economic order must after presentation to the Chambers be sent to the Council for its information. Every law of an economic order may prescribe obligatory consultation of the Council on the rules of public administration necessary to their application. The Council may demand to know how far the Government has put its suggestions into effect. Ten members are elected as a permanent commission to superintend the current business and to prepare the business for the full sessions. The Council has a small clerical and administrative staff.

The Council has been criticized most because the idea had been so vigorously pressed by the Trade Unions, and the employers were hardly represented on the preparatory commission. As in Germany there is a jealous unrest regarding the proportionality of the representation, and the short-sighted jealousies of deputies and senators, who babble in terms of the Estates-General! as though these had returned and threatened the good of France. The Council has

reported on Housing, National Industrial and Commercial Equipment, and Public Works, on relief of unemployment, classification of the railways, and is engaged on an inquiry into production.

At the end of 1927 Poincaré submitted a bill for the establishment by statute of the National Economic Council. It urged that the Council had been established by decree as an experimental stage, it sought to mollify 'the mandatories of national sovereignty, who alone had the right to speak in its name'. The Government asserted that much had been done to produce the mutual understanding and respect between employers and employees, between the various branches of industry. The utility of the Council as an advisory body was beyond doubt. Hence a fuller constitution, on a more permanent basis, with amendments of composition where this was shown to be necessary. Hence a more comprehensive and better classified grouping of representatives with amended proportionality of representation was proposed. In order to secure interest in the work of the Council it is proposed that all its proceedings and recommendations should be published: it is to be stimulated by publicity, and publicity is to enlighten Parliament and the public (cf. *Journal Officiel*, Doc. parlementaires, Annexe, 1927, p. 240 ff). This bill has not yet been discussed.

Experience has, however, as in the German case, already demonstrated the necessity of such bodies, their high utility, and the essential problems of their existence.

England.

THE COMMITTEE OF CIVIL RESEARCH AND THE ECONOMIC ADVISORY COUNCIL

A Committee of Civil Research was established by Treasury Minute of 28 May, 1925 (Cmd. 2440), as a 'Standing Committee reporting to the Cabinet, analogous to the Committee of Imperial Defence'. It was to consist of the Prime Minister (the President) and 'such persons as are summoned by the Prime Minister'. 'Outside' experts were to be summoned 'for consideration of particular business', and sub-committees, also including outside specialists as well as expert officers of the Departments concerned, were to be created for the same purpose. The Secretary of the Cabinet and of the Committee of Imperial Defence were made responsible for the secretarial arrangements, while suitable Departmental officers were to act as secretaries to sub-committees.

It was expressly stated that the Committee was an advisory body only. 'The Committee will be charged with the duty of giving connected forethought from a central standpoint to the development of economic, scientific and statistical research in relation to civil policy and administration, and it will define new areas in which inquiry would be valuable. Within these limits the Committee may consider such

questions as are referred to it by the Cabinet, the President, the Chairman and Government Departments.'

On the grounds that the Committees of Imperial Defence and of Civil Research were considered as sub-committees of the Cabinet, information regarding composition and its deliberations was always refused.

(Reports were published: on Radium, on the *British Pharmacopœia* (1928, Cmd. 3101), on the Fishing industry, and on the agencies of research in all the Departments of Government.)

The Committee was not restricted to co-ordinating existing research services, and on 24 July, 1929, the Prime Minister, Mr. MacDonald, indicated that he was prepared to refer to it general economic questions of major importance, and, that in future it should consist of a nucleus of Cabinet Ministers to whom should be attached men and women who could best assist it with whatever business was before it. A further hint of change was apparent in his proposal 'to make this committee useful as part of our machinery of government'. Moreover, in *Labour and the Nation* (rev. ed. 1929) it had been stated that 'a Labour Government will establish a National Economic Committee, acting under the directions of the Prime Minister, which will be his eyes and ears on economic questions, and keep both him and the country informed as to the economic situation and its tendencies'.

Hence, the Treasury Minute (Cmd. 3478) of 27 January, 1930.

Nature and Purpose. The Economic Advisory Council is defined as a standing body reporting to the Cabinet. Its purpose is 'to advise His Majesty's Government in economic matters. To make continuous study of developments in trade and industry and in the use of national and imperial resources, of the effect on legislation and fiscal policy at home and abroad, and of all aspects of national, imperial and international economy with a bearing on the prosperity of the country'. It is to 'take over and expand the functions of the existing Committee of Civil Research' and to co-operate with the Departments in the study of economic problems of national interest, without interfering with the functions of Ministers or Departments.

Organization. The organization of the Economic Council is prescribed with some detail: in addition to the Prime Minister (Chairman) who may summon other Ministers, the following are made permanent members—the Chancellor of the Exchequer, the Lord Privy Seal ('while the present duties are attached to that office'), the President of the Board of Trade and the Minister of Agriculture and Fisheries; and then there are nominated such other persons chosen by the Prime Minister in virtue of their special knowledge and experience in industry and economics. The professions of a list of nominated members may be grouped as follows: Directors of Companies, 3; Bank

Directors, 3; Chartered Accountant, 1; Director of Co-operative Wholesale Society, 1; Trade Union officials, 2; University Lecturers and economists, 3; Scientific Advisers to Government, 2.

The Minute prescribes that the Council is summoned by the Chairman and will meet as regularly as is found possible. There are, in fact, frequent meetings of the full Council and its Committees (*Hansard*, Vol. 236, 1930).

Standing committees and sub-committees for special purposes can be appointed at the Chairman's discretion The Council has, of course, a sufficiency of secretaries.

Functions. The 'Functions' of the Council include the giving of advice upon and the initiation of inquiries into any subject falling within its scope, including proposals for legislation—provided that the Prime Minister approves. The Council is to consult Departments and outside authorities in regard to its work and also to 'collate' statistical or other necessary information. Further, a list of persons with industrial, commercial, financial and working-class experience, and persons who have made a special study of social, economic and other scientific problems is to be drawn up in order to provide the Council with a wide range of assistants.

But the key to the operation of the whole system is given in the concluding provision about functions: 'Its reports and work will be confidential unless the Council advises the Prime Minister otherwise. Any action arising out of them will be taken on the sole responsibility of His Majesty's Government.'

The result has been that Mr. MacDonald repeatedly insisted on the confidential nature of the reports and even said that a great many of these reports are only possible because those who give information are assured that the seal of confidence will be placed upon them (11 Nov. 1930. Vol. 245, 850). It seems more than probable that an equally cogent reason for secrecy is the use of the reports as a basis of governmental policy. If this be the case it is obvious that publication would place all parties on the same level and involve endless controversy.

However, some six or more reports have been published, including that of the special Delegation which investigated the industrial conditions in the iron and steel industries of France, Belgium, Luxembourg, Germany and Czechoslovakia (Cmd. 3601, 1930). According to the *Liberal Magazine* the inquiry was made as a result of the frequent complaints against the unfair competition of sweated labour on the Continent: the report dispelled such notions.

Requests for reports on such subjects as the Gold Standard, the Distribution of National Wealth and Trade Depression and Unemployment have been refused: the reasons in each case were different, but the underlying principle was that the Council is not a kind of

permanent Royal Commission. This was implied by the Prime Minister when he said that a report on the trade depression would not be in accord with the essential character of the Council. The all-important problem of unemployment, however, did come under review by the Council (Reply, 3 Feb. 1931, Vol. 247, 1621).

CHAPTER XXI

REMEDIES FOR DEFECTS IN REPRESENTATION

THE actual electoral and parliamentary process already described presents a picture vastly different from that presented in the pages of Rousseau and elaborated by democratic writers in the nineteenth century. The voter is but formally sovereign and equal, and he is neither free nor rational; and at a certain point, where the professional Civil Service, central and local, begins, the cardinal feature of the democratic system, election, fades and loses effect. The constituents are assembled, taught and drilled in their constituencies and they are embraced by the long arms of nation-wide party organizations. In the centre is Parliament, not the product of spontaneously assembled, mature, and rational citizens, freely judging the issues after a conscientious survey of the 'national' mind, will and purpose, but of a semi-rational, highly emotional oral contest and physical demonstration, conducted by little groups of leaders. Nor are those leaders simply party men; they are as often the organizing agents of economic and cultural sectional groupings of all kinds working primarily for their own benefit. Nor are the parliamentary assemblies simply created at infrequent general elections and then left to their own devices: they are perpetually besieged and invaded by the agents of organized functional associations, as well as of the territorial constituencies and the party machine, in order to adapt themselves to the daily changes of social circumstance, and to deliver, in the name of the nation, the special satisfactions claimed by the diverse groups. Moreover, these elements, these special representative organizations, have received official admission into the deliberative councils of State: there are Advisory Committees, Commissions of Enquiry, Economic Councils, and continuous contact is maintained, and influences exerted, on Cabinet and Civil Service. To judge the efficacy of the system it must be considered as a single operating complex, not well-systematized yet, but certainly moving towards that end.

Yet there are defects and criticisms, and the chief are those brought to light by (*a*) the theory of Guild Socialism; (*b*) discussion of the nature of the electoral system; and (*c*) the problem of Direct Legislation and (*d*) the problem of the compulsory vote.

Guild Socialism[1] is the product of two streams of thought: socialist and democratic. These together propose a State in which there shall be at once strict communal control of production and distribution and yet extensive self-determination. The theory of its political machinery revolves around the defects of representative government. It is alleged that the central fallacy is the belief that the representation of one person's will by another is possible. The will is too comprehensive and too subtle in its multitude of components to permit of representation. Thus, originally Rousseau; thus of recent years, Cole and Webb.[2] But if general representation is impossible, then a system based upon it must be defective. How, in fact? The issues submitted by the parties must be superficial, as empty as they are extensive; they must be centrally dealt with; they must be a confused multiplex, upon most elements of which the electors must necessarily be ignorant; and, finally, the central parliament cannot help treating all citizens *uniformly* instead of diversely.[2] Such a system is actually based on territorial constituencies in which, in fact, there is no real community of feeling or will, since, though people live in the same neighbourhood, they have very different interests. What, in fact, is there to bind the incongruous, and often hostile, residents of any little area you like to take into a constituency? What *unity* is there which can be said to be representable? These critics answer, Nothing.

What is the remedy? It is to admit the diversity of interests; to accept the grouping of citizens as producers, consumers and cultural interests, and each of these great classes in its multitude of separate groups,[3] and to vest in these groups the *original* power of self-determination in regard to all things which concern it alone as a guild, and then to settle, in joint deliberation, the problems of inter-guild and intersectional collision. Why will this be better than the present system? Because it will give to the small groups the right of judgement and decision, and this will be based upon the oneness, the knowledge and the intensity of interest possible only in a small occupational group, where the objects are restricted and the mind continuously and immediately concerned. Here you can have representation: but not in the State.

Now this view of representation is so true in substance that the actual development of representative government, since Rousseau's time, has made it, as a practical criticism, superfluous. To avoid centralization there is local self-government; to avoid uniformity

[1] Cf. Cole, *Social Theory* (1920) and *Guild Socialism Re-Stated*, and an opponent, G. C. Field, *Guild Socialism*.

[2] Webb, *A Constitution for the Socialist Commonwealth of Great Britain* (1920), Introduction, p. xiii ff.

[3] So far also Larnaude, *The Present Evolution of Representative Government* in Report of Inter-Parliamentary Union, 1928; cf. also the account given in Lautaux-Poudeux, *La Représentation Professionelle*, 1927.

there is the flexible application of statutes by rules and orders made by the administration, whether in the central or local bureaucracy, or through administrative tribunals, before which the interests concerned are represented; in most departments of State there are consultative councils composed of experts and representatives of relevant organizations; agents are elected to Parliament, appear before parliamentary committees, negotiate with the Cabinet and Bill draughtsmen; and all these formal agencies of decision take no decision without previous submission of their intentions to the producers, consumers and cultural organizers; political parties themselves are constituted by negotiation with certain groups. If account of all this is omitted, the nature of modern representative institutions is gravely misrepresented. It may be said that only exaggeration can produce desirable reforms. But this is only partly true, for in the exaggeration itself there necessarily exist the germs of serious mistakes. The Fascist régime is based, so far as theory is concerned, upon criticism of representative democracy analogous to Guild Socialist criticism, and naturally what is deemed to be its most powerful pillar, is precisely its most faulty one, namely, the portrait of Rousseauite abstractions unqualified by all the actual devices of modern representation.

As soon as one looks at the constructive side of Guild Socialism its defects leap to the eye. It does not proceed from the integration of the community, and then temper this with the representation of differences, but it proceeds at once from the postulate of disintegration into a large number of separate communities, whose ultimate integration is thenceforward to be fabricated. In the light of human experience this is a frightful prospect. It has taken centuries for some permanent community of interest and feeling to be produced in the State, and, for the sake of peace (if one desires peace), it is surely the minimum foundation to be preserved. In its international relations the world is lost because no inter-State community exists. In some European countries already economic and social interests have shown their implacability, with a resultant friction and instability surely to be avoided; and in Italy it is doubtful whether the corporative State could peacefully function were it not for the framework of values into which it is forced by the personality of Mussolini and the latent threat of coercion by the integrating element—the Fascist Party. Without these the corporations would not march together.

Experience in the countries with Economic Councils also demonstrates the truth of a corollary of this view. Serious difficulties had to be overcome in the appointment of members in the representative body to each group, and even when an arrangement was secured, hardly any one was satisfied.[1] Now these fierce collisions occurred,

[1] So in Germany; so also in France, cf. Chap. XX *supra*.

not in bodies with a power of final *decision*, but simply a power of consultation, in which whether they were in the majority or not, their views were put before the public and ultimately modified by a parliament elected by territorial constituencies. Is it really conceivable that one could find even a temporary solution if the Guild Congress were to be a sovereign body? if it handed down binding decisions and not mere expressions of opinion? The search for a formula would surely end, as it threatened in the actual cases, in a decision that, since no ultimate test of the social value and conceit of each occupation could be objectively established, the only permanent peace-giving formula is: equal and universal suffrage to a common parliament. That is, the present system. Further, the assumption that men are so much more interested in the affairs of their occupation is not borne out by analyses of voting in their occupational councils.[1] Recent studies have shown that a terrific amount of effort and attention to technique are required to get employers [2] and employed [3] to mind their own business.

Nor is that all. So soon as the members of an occupation are called upon to elect members in a guild system, they cannot elect for separate questions, but in the end must be called upon to choose representatives not only to settle intra-guild matters but both near and distant subtle problems as between guilds. The original difficulty of representation recurs, but now in a State not based on the presumption of harmony, but on that of syndical claims.

The real difficulty, of course, is the management of a vast State which integrates thousands of different personal, local and syndical interests. It is not soluble by disintegration and the consequent encouragement of guild conceit and selfishness (have we not all an interest in the prevention of corporate and personal abuse of possessions and cultural values as well as in a *post facto* correction of them?), but by integration first, and then devolution, legislative and administrative, and always consultation of the associations and localities. In the centre of the integrative process are the communities we call Political Parties, and Parliament, and the conception of the numerical equality of citizens. Only those who are presumed to be equal will express themselves freely and accept the final decision; only

[1] Cole has handsomely thrown over the theory of representation he once held (cf *The Next Ten Years*, p. 158 ff.) largely through a growing disbelief in his former theory that representation was a supreme good, and that representation must be ubiquitous.

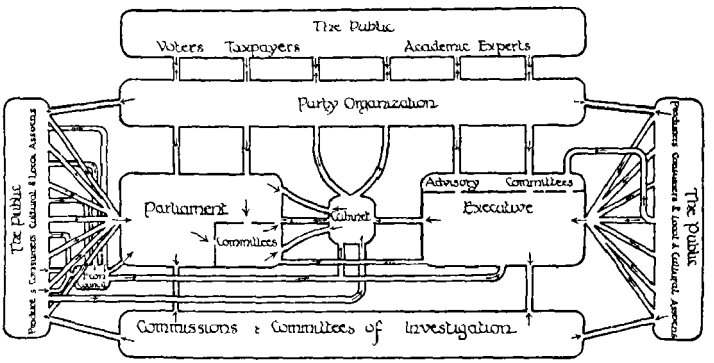
[2] Cf. H. L. Childs, *Labour and Capital in National Politics* (1930), Chap. 6. Especially p. 166, where the proportion of the organizations of the American Chamber of Commerce voting on 43 referenda between 1914–27 is shown never to have exceeded 73, and more often than not, to have been only a little over 40 per cent.

[3] Gosnell, *Why Europe Votes*, pp. 22, 23. My own direct experience in the Co-operative Movement in Great Britain shows that only about from 5 to 15 per cent. of the shareholders vote in elections for Management Committees.

those who are denied their claims to superiority will listen and obey. The present system, put into the form of a diagram, gives a good idea of the integration and mutual influence, in and outside, the classical conception of Representative Government, and shows graphically how institutions have been created to overcome the chief defects announced by critics:

THE VISCERA OF THE MODERN LEVIATHAN

SHOWING THE CONTINUOUS WORKING RELATIONSHIP BETWEEN THE VARIOUS ELECTORAL, VOCATIONAL, PARLIAMENTARY AND EXECUTIVE ORGANS OF THE MODERN STATE



Yet, as we have amply seen, there is room for much improvement in the present institutions. Among those with which we have so far not dealt are the reform of the electoral system and the problem of the referendum.

The Electoral System. Now we have given reasons for doubting whether there is ever likely to be a representative system which does not depend, in the last resort, upon decision by a majority of members representing the citizens as equal. Indeed we are certain that in the long run there is no other alternative. Then the question immediately arises how best can one attain *exact representation*?

The ideal system, that is to say a system having exactness of representation as its only object, would be that in which the whole nation was taken as a single constituency, where lists of candidates for the whole number of members of Parliament could be presented and advocated by anybody. Such an arrangement, if it could be organized, would provide an exact reflection of majority and minority groups. But its defects are not only serious, they are destructive of the values which most people want from representative government.

Because it presupposes a national campaign, it centralizes authority in the party machine, to organize the issues and conduct the campaign. It permits the least amount of local and personal adaptation of the candidates. It abolishes by-elections. It makes the contact between voter and programme immediate, when what is needed is the mediation of a candidate between the two, to explain the programme to the voter and modify the programme after observation of the voter's reaction. In default of this arrangement, what is to be adopted? The division of the country into constituencies sized according to convenience and equity. Convenience implies that the constituency should be not too large for the maintenance of personal contact between candidate and voters, and of perhaps more importance, between the local party associations and their clientele in the neighbourhood. Equity implies that the constituencies shall be as nearly equal in population as possible; and when this principle is applied, not once and for all, but continuously as the distribution of population changes in times of mobility—when it is applied simply and without 'management', then it can be taken by the law of averages and in the long run that there will be no undue advantage to any party and no disadvantage to any, by reason of this cause alone.

Two practical questions then arise: what is a reasonably sized area and ought there to be only one or more seats per constituency, and secondly, whether, in fact, politicians are so unfair as deliberately to produce or maintain inequitable election districts. A word or two on the second question first.

The U.S.A. more, perhaps, than any other country has familiarized us with the practice of 'gerrymandering'.[1] To 'gerrymander' is so to arrange the shape of constituencies that your own party's majorities, however small, are spread over the largest number of constituencies possible, and your opponent's majorities, made as large as they can be in each constituency won by him, but restricted to as few constituencies as possible. In various States of the U.S.A. the most remarkable conformations of electoral districts resulted from the recurrent attempts of the party in office to make office for ever impossible to the opposition; there are 'shoestring', 'saddle-bag', 'belt-line', and 'dumb-bell' areas, and the one which gave the name to gerrymander was of the shape of a salamander. Now men seek to cast out the devil from themselves by pledging themselves to a constitution, and in most State constitutions it is provided that electoral districts shall be compact in form, contiguous in territory and contain the maximum possible equality of inhabitants. Yet even within these requirements the bosses and their henchmen act effectively. However, the system provokes retaliation, public

[1] Cf. Woodburn, *Political Parties*; Brooks, *Political Parties*, p. 434 ff.

contempt, and if the majorities are spread too well, a slight turnover in votes may cause a loss of the seat. But the most salutary merit of Representative Government is the incalculability of popular judgement and the need of its continual canvassing.

In England redistribution has been decided on as an agreed measure of both parties,[1] and carried out by an impartial body of commissioners,[2] and on the whole a laudable fairness rules the question. In Germany the principal unfairness until 1919 was in the obstinate refusal to redistribute seats which had been first distributed as far back as 1867; its particular system of Proportional Representation is scrupulous in its equity. In France, what has been called *géographie de circonstance* was extensively practised until recent years, more so, before 1870, when the semi-autocratic Executive had a vested interest in a pliable Parliament. Under the rule of the parliamentary commission on universal suffrage and the Government which introduced distribution bills, the amount of fraud is small: like all the manipulators of redistribution it finds the greatest difficulty in dividing well-knit neighbourhoods, whether cities or urban districts, when their population is above the maximum number of inhabitants per constituency, and when it has planned its redistribution, the parliamentary commission reviews it in the light of evidence presented by the existing deputies. Yet the constituencies vary all the degrees between 22,160 (Lozère) and 120,000 (Grenoble), the aim, however, being to put the regular minimum at 40,000 and the maximum at 100,000.[3]

Let us now turn to the question of representation within each constituency thus created. It would be possible to have more than one seat in each, or only one seat: multiple-member or single-member constituencies, and the latter system is in existence in England, France, the U.S.A. and the British Dominions, but many countries have accepted, most of them in recent years, multiple-member constituencies.[4] What issues are raised by these diverse methods?

Single-member Constituencies. The problems raised by single-member constituencies are different according as the majority required is absolute or relative. In the English and American systems, usually also in the British Dominions, only a relative majority is required to win the available seat; in other words, whatever the number of candidates, the one at the top is elected. Now this may have results which may be considered generally to be highly inequitable, for it is clear that as soon as more than two candidates compete, the topmost candidate may secure election by a minority of the votes cast in the constituency. This may produce injustices in some constituencies and general nation-wide misrepresentation.

[1] Cf. Morley, *Life of Gladstone*, II. [2] Cf. Report of Commissioners, 1918.
[3] Rapport Supplémentaire, No. 4625 (Baréty), Chambre des députés, 1927.
[4] Cf. Hoag and Hallett, *Proportional Representation*, 1926.

In Great Britain, owing to the rise of the Labour Party and the continuance of the other two parties, many three-cornered contests are fought, with perturbing results. Thus [1]:

Elections of 1924		
Parties	*Votes*	*Seats*
Conservative	7,451,132	412
Liberal	3,008,474	46
Labour	5,484,760	151
1929		
Conservative	8,659,639	256
Liberal	5,309,426	59
Labour	8,385,301	288

Now it may be argued that the luck of the ballot will be evenly spread among the various parties, as a whole. This may be so, and on one occasion at least, luck has been almost exactly evenly distributed. Yet it is only hazard, and the history of constitutional development shows a continuous desire of mankind to pass from hazard to controllable principle.

What is to be done? Neither the French, nor the Germans before the introduction of Proportional Representation, nor many parts of the British Dominions leave the matter to chance. They use either the Second Ballot or the Alternative Vote System. Both repose on the principle that no one should be returned to Parliament who only has the support of less than 50 per cent. of the voters.[2] They make an attempt to secure an *absolute* majority for the ultimately elected candidate, but they proceed by different methods. The Second Ballot System proceeds upon a general election which either, in each constituency, gives one of the candidates or none an absolute majority; if the former he is duly elected, if the latter, then a second election occurs, when all the candidates below the top two drop out, and the contest is between these two. This second ballot occurred in France up to 1914, a fortnight after the first; by the Electoral Law of 1927 it occurs one week after the first.[3] For the German Reichstag up to 1918, similarly.[4]

The merit of this system is that it gives to the people the opportunity of reconsidering their vote when they know by the first result that certain candidates are out of the running and that their choice is now restricted. Many cannot have the man or woman they most prefer; they are given the opportunity of deciding which of the remaining candidates is nearer their first preference. There is one

[1] Figures from Pamphlets of the Proportional Representation Society.
[2] Humphreys, *Proportional Representation* (1910).
[3] Cf. Rabany, *Guide Général des Elections* (1928).
[4] Hatschek, *Parlamentsrecht*, p. 388 ff.

other merit: the elected candidates will make law and control administration. It is, in the long run, essential that the general body of citizens shall be satisfied with the equity of the system of government, and they are most likely to be satisfied if it can be shown that it rests on a majority of popular votes as well as parliamentary seats. Now the majority produced by the system of the second ballot or the alternative vote is a kind of second-best, not a wholehearted first choice, it cannot be called as sound a majority as if it were composed altogether of first preferences. Yet the people may think so, or at least be satisfied that this majority, however compounded, is better than pure minorities. The statesman cannot reject such a factor.

Yet there are serious demerits in the second ballot system which decades of actual electoral experience have demonstrated. They are concisely and authoritatively represented in a recent report of the French Chamber of Deputies.[1]

'(1) The respective situation of parties is falsified. It is impossible to gauge the importance of the various political groupings by reference to the results of the second ballot; the victories won on the second ballot are the product of a transaction most often obtained to the detriment of ideas and programmes; (2) It often happens that these bargains are arranged under conditions which have nothing at all to do with political contests and which M. Dessoye, *rapporteur* of the Law of 12 July 1919, called "obscure anxieties"; (3) The possibility of a second election even falsifies the results of the first. A large number of electors, in fact, use the first ballot for manifestations of sympathy or personal rancour and wait until the second round to express their political sentiments. Others, finally, give their votes to such and such a candidate, solely to produce another election; (4) The second ballot engenders a recrudescence of violence which is not calculated to heighten the morality of the election. Further, it is an extra source of expenses, and the prospect of a second round may suffice to keep out of the struggle candidates who are poor.'

Now some of these criticisms apply more particularly to France; not that they will not apply elsewhere, for every institution has its products, good and bad—but the intensity and quality varies in different human and organizatory environments. Matters, for example, are particularly bad in France because of the weakness and multiplicity of parties, and a tradition of electoral corruption, and there is ample evidence of the unholy bargains produced, especially in the interval between the ballots. From France we have the phrase that the elected deputy is 'the prisoner of the minority'[2]; from Germany before 1919 the term *Kuhhandel*, cattle-dealing, among the parties. Nor were, nor are, the arrangements made between the parties before and during the elections, for mutual support at the first or second ballot, always kept. Who knows what emergency will arise in the space of four years to make it nationally impolitic as well as undesirable

[1] Rapport (1927), No. 4625.

[2] Cf. Bonnafous, *Le scrutin d'arrondissement et la politique*, 1926.

for the party that engagements should be kept? Nor is the location of responsibility clarified. The second ballot is indeed disturbing, since, in French conditions, it decides the complexion of the new Assembly. These were the numbers of second ballotings:

1889	211	
1896	178	
1902	174	in Assemblies
1906	157	of about 600
1910	227	members.[1]
1914	252	
1928	425	

To avoid the evils peculiar to a second ballot the Alternative Vote was invented, a system whereby there is only one election, and where the voter numbers his preferences at once, saying, in effect, if my first preference candidate does not succeed, then divide my second and third vote preferences among the top candidates. There are two ballots in one operation.[2] This, in fact, avoids the double expense and the double turmoil, but it does not get rid of inter-party bargaining *which occurs before the election.* There is no doubt that the arrangement gives a peculiarly forceful position to the minorities, in the election as in Parliament: a direct product of the system in combination with the existence of several independent parties determined to live in independence. We return to this again later.

Proportional Representation. From the standpoint of exact representation alone these systems may be improvements on the single-member constituency with relative majority, but they have still serious defects. (*a*) The actual majorities and minorities may still not be proportionately represented in the House; (*b*) certain small minorities may still not be represented at all. These criticisms have been urged by a long line of theorists and politicians without distinction of party, and their political import must not be under-estimated. Nothing less than the authority of government is in question. At some junctures and in some legislatures a few votes may make all the difference, for years. It is of the greatest importance that no citizen should have sound reasons to believe that he is being commanded, it may be in most vital matters, by a minority. Hence the demand for mathematically exact representation of the electorate.

What does this involve? It involves always, whatever the size of the constituency, multiple-member constituencies, and the number of seats available must be so great as to give each coherent, well-knit group of voters with a faith sufficiently different from that of others,

[1] Cf. La Chappelle, *Les Régimes Electoraux*, 1930.
[2] Cf. Humphreys, op. cit.; cf. also Debates, House of Commons.

the assurance of independent existence.[1] The number might be 5,000, or 10,000 or 30,000, or smaller or larger—how much it shall be must depend upon the total number of representatives which are considered to be sufficient, and not too many, to compose a technically convenient legislature. Only if there are constituencies with several seats can there be the independent representation of minorities and majorities—for it is obvious that *one* man cannot be all things to all men.

Now it is rare that a judgement of a system is formed by reference to a single merit or demerit, and so with the various arrangements for proportional representation. If there were no consequences to count then we should say that representation means mathematically exact representation; the single-member constituency stands in the way; it must be abolished. But omelettes cannot be had without the sacrifice of eggs: is the omelette worth it? That is the question. It is urged by many students that the procedure involved in producing mathematically exact representation involves the loss of other desirable qualities in the system of government, and that this must be taken into count in a judgement of the system. The issues involved become most clear if we review two of the many varieties of proportional representation possible. I take first the system which actually operates for the German Reichstag.

The principle of Proportional Representation is laid down by the Constitution, and special laws have determined the details of the system.[2]

The original arrangement was elaborated hurriedly in consequence of the sudden determination to hold elections for the Constituent Assembly. The impulse to Proportional Representation was immensely strong; it was compounded of devout worship of democracy by the revolutionary parties, belief that governmental justice was obtainable only by Proportional Representation, the terrific reaction from the injustice of the old single-member second-ballot system and the maldistribution of seats.

Broadly the characteristics are as follow:

The whole country with 65 million inhabitants is divided into 35 constituencies (*Wahlbezirke*); Great Britain, with 40 million inhabitants, has about 600 constituencies.

The average size of a German constituency is 1·7 million inhabitants, or about 1·15 million registered voters. The largest is Würtemburg, with a little over 2½ million inhabitants, and the smallest, East Hannover, with about one million. These constituencies are then further

[1] For the case for Proportional Representation cf. Humphreys, op. cit., and *Practical Aspects of Electoral Reform* (1922); La Chappelle, op. cit.; and a collection of articles by Schauff, *Neues Wahlrecht* (1929).

[2] Cf. Art. 22, and Kaisenberg, *Die Wahl zum Reichstag* (3rd Edition, 1928).

grouped into 16 conjoint-constituencies (*Wahlverbände*); in some cases the original constituencies are left, in others two or three are combined. The average number of seats per constituency is eleven.

The parties establish a list of candidates for each constituency. The characteristics of the list are important: parties are named on the list; this was not so originally, but by 1924, politicians had discovered that the names of the candidates were insufficient indication to the voters [1]; in addition, on the ballot paper, each party is designated by a number, and this is determined by the strength of the party in the last Reichstag, e.g. the Social Democrats, List I. (*a*) It is not compulsory to name more than four candidates; that is, after the first four candidates are named on each list, the voters may be confronted with and may vote a blank support to a party organization which has the power to fill the places to which it becomes entitled.

(*b*) The list in any one constituency may be joined with that of any other within the conjoint-constituency upon declaration, and this gives small parties the opportunity to combine their strengths by arrangement in different parts of the country.

Thus, there are large constituencies with your list of candidates, and the possibility of combining your list with that in a contiguous constituency.

(*c*) Each party establishes a list of candidates for the whole of the Reich. (*Reichslist.*)

The electors have one vote each. They must accept the whole list and nothing but the list, by marking a cross in a circle at the top of the list in the ballot paper, and the votes go to the list, not to separate candidates. *For each* 60,000 *votes a party is entitled to one member*, e.g. if there are 260,000 votes, there are four seats plus 20,000 surplus votes.

Now, in a perfect system of Proportional Representation such surplus votes, which might be as many as 59,999 in any constituency, must not be lost; therefore all surplus votes are collected and aggregated within each of the sixteen conjoint-constituencies, and, again, for each 60,000 of these the party gets one more seat. But if the surplus in any one constituency is not more than 30,000 or over, the surpluses are not counted. Finally, surpluses in the conjoint-constituencies (and in single constituencies where the parties have declared for a direct transfer to the *Reichslist*) are swept together and ascribed to their *Reichslist* of candidates. Here, again, each block of 60,000 votes secures a candidate for the whole Reich. If after this division there are still surplus votes, then the fraction of 30,000 and over obtains one seat. There is one qualification: *in order to avoid the fostering of small parties* no party may receive more members of Parliament

[1] Cf. Koellreutter, *Die Politischen Parteien im Modernen Staate*, p. 67 ff.

from its Reich list than it has obtained in the constituencies. For example, if a party has four members in the constituencies it cannot have more than four from the Reich surplus. The system is almost perfect in its equity from the standpoint of a 'snapshot', but not quite; for we must not forget that though the intention was to be absolutely equitable, small and scattered parties were deliberately put at a disadvantage to avoid the fragmentation of the party system, and its consequent difficulties in forming stable coalition governments.

There are no provisions for by-elections; therefore, when the ordinary lists are being drawn up by the party organizations, substitutes are added to provide for possible vacancies.

Thus the general characteristics of the system are: the largeness of the constituencies; the length of the lists; the combination and reward of the surpluses, particularly on the Reich list; (this, together with the ascription of seats to each 60,000 votes obtained, has earned the system the title of 'automatic system'); the absence of by-elections.

Germany has had experience of six elections under this system, and it is already possible to draw valid conclusions. Whereas there was a fervent belief in the system at the outset, there are now serious doubts, and there are plans for reform before the Reichstag.[1]

In judging an electoral system three questions always arise: is it mathematically equitable? does it produce a wholesome contact between constituents and representatives? does it favour or jeopardize governmental stability? To the first the German answer is Yes; to the second a decided No; to the third, that it jeopardizes governmental stability. Upon what facts and reasoning are these answers returned?

The system tends to split up big parties and to encourage the formation and independence of separate groups. Before the War there were seven big parties, to-day over a score are electorally alive. The tendency is towards a further disintegration. How far is proportional representation, in fact, responsible? German social conditions, even apart from the electoral system, favour the creation of electoral parties, partly due to the national genius for association, but largely owing to the full and sudden onset of democratic government with its fissiparous temptations. This coincides with an age when the whole world is affected by a rather implacable division of economic and class interests. In England and the United States the party system preceded contemporary social and economic sectionalism, and still contains, though with enormous difficulty, the warring elements.

Yet proportional representation itself positively contributes to the

[1] For discussion of the system cf. Koellreutter, op. cit., Schauff, op. cit.; Ziegler, *Archiv fur Sozialwissenschaft*, 1926, Vol. 55, p. 471 ff.

aggravation of successful sectionalism. In England a small party—for example, the United Empire Party—would fail to secure a single seat and would either die out or make alliances. With the German system its surpluses over 30,000 in a constituency of, say, one-half million, would be swept together, and it would receive seats. In Germany it is possible for the Christian and the atheistical peasantry to be separately organized; for the Catholic and the Protestant or atheistical artisan to be separately organized; for the large and small landowners to maintain separate groups; for 'national' socialists to confront 'international' socialists; for the Liberal Party to lose, one by one, its constituent middle-class elements, which organize severally. The evil is grave, for two reasons: it makes more difficult the formation of governments, for by giving the groups independent strength in their own right, one more *corporate* conceit and resistance is created. Secondly, and perhaps of greater ultimate importance to society, is the driving of a number of nation-wide wedges deep into the body of the electorate, producing sections whom it is important not to make hostile, as this does, but to integrate. A human tendency may be either promoted or counteracted by an institution, and the separatist mentality is promoted by the automatic list system, and counteracted by the single-member majority system.

The system causes vested interests to gain control of parties. Parties can calculate accurately, within a margin of 10–20 per cent., how many members will get in. In single-member constituencies they cannot: for that is a system of ever contingent electoral revulsion. Economic interests approach the party leaders and offer support of all kinds in return for the names on the list. This happens in all modern democracies, but it is easier to effectuate with the list system.

The central difficulty of the system is, of course, the large constituency and the long list, which inevitably throws into the hands of the parties, and more, the central council of the parties, the selection of candidates. It is even complained that the principle of *direct* election is infringed by the extent to which the parties intervene between the electors and the candidates. Further, if the party leaders settle the lists of names, they can demand unconditional allegiance from the successful candidates, and as a result the members' attention is turned always more to the party machine than the constituency. Now, we have shown that in England also the parties are centralized and have a strong control over candidates, but there is always the chance that the candidate and the constituency may revolt. There is a rather subtle personal relationship between the member and the constituency which makes the dictatorship of party leaders effectively challengeable. A constituency may rather pride itself on the heterodoxy of a member above the average in ability; and at any rate the

member has a definite circle of constituents to whom to appeal. In the German system to whom shall the heterodox appeal for support? He is one of a team, and was hand-picked.

Nor should we forget that whereas in England 600 local associations of each party participate in the choice of candidates, and in France 620, and in the U.S.A. also a considerable number of hundreds, in Germany there are thirty-five, or even less, centralized authorities for the choice and placing of candidates. Which system better provides the real selection of a representative, or, in other words, which is more representative? Further, a very large number of members are not elected in the constituencies at all, but from the Reich list which is established by the central party organization. Thus [1]:

Elections	*Total Seats*	*Number of Seats won on the Reichslist*
1920	466	51
1924 (May)	472	72
1924 (December)	493	73
1928	491	75
1930	577	91

In other words, in regard to a large number of candidates, those elected on the surpluses, the electors did not know at all for whom they were voting, nor in the end, who were elected.

In the place of a large number of personal contests, there are conflicts of national party programmes; not that in the first case there is no reference to personal character and deviations from the programme. However, there is a difference and its effects are variously valued. Some say that stable, unyielding party machines and programmes, fostered by the system, are desirable. But the main, I believe the overwhelming, body of opinion considers the concentration of power in the party leaders and bureaucracy a dangerous source of misrepresentation of the dynamic inventive impulses of the party. After all, if local and sectional differences are made impossible within the party, an extra reason is supplied for the formation of new ones.

Further, the campaign becomes less intensive, and more extensive; that is, it does not occupy itself with the cultivation of the individual voter by personal intervention, but in the institution of great demonstrations, like processions, in which the mechanical apparatus for making a noise or creating a diversion is predominant. It is argued that the system makes it impossible for new leaders to grow and take command of the party forces. (This is a direct corollary of the previous argument.) But this is already going too far; it has not prevented

[1] From *Hauptergebnisse der Wahlen zum Reichstag*, published by the Deutsches Statistisches Amt after each election.

Hitler and Brüning from coming to the fore when the need arose. Yet there is a greater chance for technicians in Germany to enter Parliament, since it is possible to calculate pretty certainly on the capture of seats, especially on the Reich list.

The older politicians, well saddled in the controlling situations of the party, are not opponents of the system, because their places on the top of the list are assured ; and they are prepared to argue (soundly, we think) that security of tenure is necessary, since modern politics require a large degree of continuity and time to master professional science and tasks, a knowledge of procedure, long service on committees, acquaintance with ways and means of approaching the authorities for favours or good offices, all very intricate matters. They argue also that the system prevents undue landslides at critical times. The younger people are the strong opponents of the arrangement : they are prepared to fight and win constituencies (even if the older colleagues are defeated) by their own preaching of the evangel. Moreover, they look with dismay on the fact that so many of the seats are awarded without direct intervention of the voters at all, on the *Reichslist*, and also the fact that through money transactions representatives of powerful vocational interests are given winning places on the lists.

Since 1924 projects of reform have been plentiful,[1] for on the whole, Germany is profoundly dissatisfied with the consequences of the system. The Germans still want the *equity of the system* but not a number of small parties, which endanger the stability of government ; they wish to rid themselves of the machine character of the party ; and to establish a more living connexion between the deputy and the constituency. The common suggestion is single-member constituencies and these constituencies will be again grouped into about fifteen associated constituencies. Each member will fight alone in the single-member constituencies and if he gets the quota (e.g. 60,000 votes) he will be elected. If more than the quota is obtained the surplus will go to his party colleagues in other constituencies who will benefit in the order of the votes they themselves have earned. At this point the reformers part company, some wish to abolish the *Reichslist*, others to maintain it.

The Single Transferable Vote. Now to avoid the rigidity of the list system many gadgets have been invented, as, for example, cross-voting on various lists or the inclusion of the names of candidates by the voter.[2] Experience shows that they are worth next to nothing, that they tend to throw the voter under the domination of the party canvassers more than ever.

One system professes to provide better remedies than any other,

[1] Schauff, op. cit. ; Erdmannsdorffer, *Wahlrecht in Gefahr* (1930).
[2] Cf. Hoag and Hallett, op. cit.

the Single Transferable Vote.[1] This, like all other systems of proportional representation, is based upon multiple-member constituencies, which are necessarily large (in order to keep down the size of Parliament): 3, 5 or 7 might be the number of seats in each constituency. The parties or other groups place as many candidates on the ballot paper as they wish. Each voter signifies his choice not by a cross, but by a series of preferential numbers, 1, 2, 3, etc. The votes are counted by the Returning Officer and all candidates who receive, on their first preferences, the effective quota of votes appropriate to the constituency, are elected. Their surplus votes above the necessary quota are then transferred to other candidates who have not obtained the quota; and the transfer is made according to the voter's direction as implied by his marking of the ballot paper with his preferences. Thus the surpluses are not lost for they are transferred, it is presumed, to the party-fellows of the fortunate candidates, and, at any rate, they are re-distributed in accordance with the voters' second, third preference and so on. The advantages claimed for the system are (*a*) that every minority of the size of the quota gets one representative and (*b*) every larger body gets as many representatives as it has quotas. Hence both minorities and majorities are exactly represented.

Now the extent of the mathematical equity of the system depends upon the size of the quota, and whether the surplus votes which still will remain (though very few) in each constituency will be accredited, nationally, to the parties not quite reaching the quota. As to the first point, the smaller the quota the larger the size of Parliament; and the larger the quota, as in Germany, the more are other considerations allowed to weigh against the principle of *complete* representation. It is doubtful whether the enthusiasts for the Single Transferable Vote would permit their ideal to outweigh considerations of utility in this matter. They would no doubt accept the view that there was a margin of practicability in government where *complete* representation, pure and simple, must be modified. Then, to count surpluses, would, as in Germany, produce both the good and evil of the Reich list.

Apart from this, which, let it be remembered, is a considerable qualification, the system has merits—at least it would represent all shades of opinion more accurately than at present. But what would these cost? The price would be (1) the loss of the psychological value of the small constituency, the care of which is vested in a single member; (2) the maleficent soothing of that permanent anxiety of the party leaders as they scan their own constituency in the light of present policy and approaching elections, and as they perceive the possibilities of opposition within their own party from their own followers whose

[1] Cf. Humphreys, op. cit.; and Fischer Williams, *The Reform of Electoral Representation*.

constituencies are prepared to support dissent with contingent revolt. So much is the result of deduction: but it is also the valid implication of the German system of proportional representation. The effects on party organization and the spirit of party tactics must, however, also weigh heavily in the scale against the system.

Those effects are (3) to give added power to the party leaders as compared with the local associations of politically conscious electors, (4) to tighten the disciplinary power of the party leaders over the individual member, and (5) to encourage group divisions and secessions and thereby jeopardize the stability of the Executive. Let us consider these. Party leaders must acquire added power because the constituencies will be about five times their present size and because candidates would need to be selected as a team. The increased size of the constituency would ultimately lead to the control of the organization, tactics and choice of candidates by a council governing not a small, but a large constituency, that is, there would be less immediacy of contact between the governing council of the party and the candidates and the electorate. Candidates would need to be selected as a team. The independent member in a team of five or seven candidates would be a source of weakness to his party colleagues during a campaign, and still more during the Recess, when members go down to their constituencies. There would grow up, necessarily, a convention of Collective Responsibility of members in the constituency. The independently-minded man, if he were selected, would be unceremoniously told (especially during a campaign), to hold his tongue. The 'regular' party candidate would be adopted as the best colleague. Is there a politician who has spoken from the same platform with friends and not wanted to contradict them? Proportional representation, then, encourages tacit or explicit conformity, because a candidate's views react not only upon *his* prospects, but on the prospects of his colleagues. They will 'shut up' the mediocrities and dissentients, and, as in Germany, cover them with one brilliant 'star'.

In the single-member constituency the candidate, certainly, is also called upon to conform to the views of the party, but he may press his nonconformity with those views as far as his electors can be persuaded, and the personal relationship makes this feasible—and, meanwhile, his own chances of election are not being prejudiced by his colleagues, nor does his nonconformity injure them or bring upon all the full rigour of party compulsions and anathemas.

Next, the enhancement of the selective authority of the party leaders gives them an added claim to strong discipline over their followers. This is necessary, but not in such a measure as to exclude a power of revolt, always contingent, likely to be effective, and yet not destructive, as in a wholesale secession. Systems of proportional representation tend either to tighten intra-party discipline too much

in relation to the need for prompt sensitiveness and responsiveness to national needs, or to produce such responsiveness at the expense of a disintegration of parties. Loyalty to leaders, right or wrong, may also be claimed because the winning of seats becomes more accurately calculable—where there is a quota there is a sure seat—and in return for the gift the reward may be expected; if it is not given, what will happen at the next election?

Finally, since small groups are given the chance of independent life by the extension of the constituency, which permits the sweeping together of votes, otherwise scattered and wasted, there is an encouragement not only to that resistance which is proper to a reasonable view honestly held upon rational consideration, but to the vanity of independence and dissent for itself and to the detriment of the common good. It gives a positive bonus to group separatism. As we have shown in our discussions of the legislative and the executive branches, this has grave results, which may, at times, threaten the parliamentary system itself with destruction.

This is not all that has to be placed in the scales against proportional representation, and its abiding merit, equity. There are other considerations. (6) Those who propose proportional representation leave out of all account the political *manners* and conventions of a country—the sense of decency and political fair-play. But this is important: if the proper manners and capacities were everywhere spontaneously present, who would seek to create any institutions? In England, though the size of the Government majority is a guide to the Ministry as to what it ought and can hope to do, its views are inevitably tempered by the arguments of the Opposition, the views of members who know the real state of affairs in their own constituencies, the prospects of the coming election, the progress of by-elections. English politicians are not pedantic extremists acting to the full beat of an arithmetically regulated pulse, but with a knowledge of realities existing in the hinterland of representation in the House. Why else do they employ Whips and Chief Party Agents, if not to discover feelings and prospects, as distinct from the statistical façade presented by what they can muster, at need, in a division? Nor (7) are politics determined once and for all by the General Election, but by a multitude of dynamic and spiritual factors as efficient in the cause of good Representative and Responsible Government as the General Election itself. As we have already shown, parliaments and governments are surrounded by influences of great effect, though they are not based on elections, and there is an enormous amount of agreed, all-party legislation and administration. These factors make for as true a representation as accurate proportions.

(8) Though there are definite and disturbing flaws in the single-member constituency with a relative majority, it has some strong

points which are indispensable to secure responsiveness and responsibility in government. There is a close and necessary connexion between the Electoral System and Parliament and there is just as close and necessary connexion between that system and the Government of the day.

In the Cabinet there is concentrated the politically vital function of initiating legislative and administrative policy (including finance), and the direction and control of the activities of the Civil Service. Parliaments talk and divide: Cabinets think, propose and act. In England, at least, the Cabinet's touch with the country is as vital as its touch with the House of Commons. The mentality, native and cultivated, of English politicians, perception of the need for decision and vigour in the Executive in the face of modern problems, the necessity of decisive leadership and time-distribution in the House of Commons, popular inability to fix responsibility save when the agents of government are few, and the warnings derived from the defective functioning of foreign institutions, have combined to bestow governmental predominance upon the Cabinet, and, since 1867, tightly to lace the Cabinet to the electorate by means of strong party organizations

To be really responsive to popular opinion, the Cabinet must rest upon a party organization which is most vividly in contact with the constituencies, i.e. where the individual member has a clear and definite interest in his constituency. The Cabinet, to be effectively responsible to the country, must rest upon the support of a *single* party, or, at least, the smallest number of associated groups. For only then (i) is the electorate best able to know who is to praise or blame. At each General Election the *aspirant* Ministry comes before the electorate with a record and a policy; as it has been aptly said: 'A general election is, in fact, considered by a large portion of the electorate of this country as practically a referendum on the question which of two Governments shall be returned to power.' [1] And (ii) there need be no surreptitious political bargaining between 'ministrable' groups resulting in contracts (not submitted for popular ratification) as to policy, destructible by any one of the contracting parties, without the country being able to hold them to their pledges.

Any electoral system, therefore, which can be shown to militate against the maintenance of a Cabinet system based on a single-party organization is to be avoided. at any rate, we must not forget that the consequences are serious. To the very frequent and highly characteristic question asked by English electors: 'What is the next Government going to be?' the electoral system ought to provide a clear and unambiguous answer.

Further, (9) we are forced to the conclusion that any electoral

[1] Royal Commission on Electoral Systems (1910).

system which gives a rough numerical expression of the strength of main political tendencies, is the only one practically workable as far as Parliaments are concerned. Only a few salient principles, representing the main opposing attitudes of mind, can ever be there discussed, as we have amply shown in the chapters on Parliamentary Deliberation. It would be useless for every little group to be represented; the assemblies have not even the time adequately to discuss the views of three great parties in the State on all the issues that arise. An electoral system based wholly or mainly on the desire to give any and every small group the chance of returning a representative would be a political futility; for only by a rare stroke of luck would the representative get the opportunity of speaking. If any assembly were fully representative—as the more extreme advocates of proportional representation suggest—no business could be done. The exigencies of Parliamentary time (besides other matters) force men, therefore, to leave their small caves and enter larger combinations for the support of a common programme; and, as they do this, the *exactness* of representation is *seen to be a thing of neither great nor ultimate political moment.*

(10) Many issues arise in the course of the Parliamentary period which were but dimly perceived, or not perceived at all, at the time of the election. It is good, though not vital, to have some definite indication of public opinion upon them. The method of a Referendum is impossible, as we shall show presently. But the close connexion between member and constituency, the interest of the member in the discovery of dynamic opinion in his constituency, is one guarantee of popular consultation. As there is an 'atmosphere' in the House of Commons, 'the sense of the House', which Ministers do well to assimilate, and which can only be assimilated by constant attendance on the Treasury Bench, *so there is an electoral atmosphere the best appreciation* of which can come about only by a highly personal interest in the constituency. The House of Commons is, moreover, profoundly affected by the arguments raised at a by-election; and whereas the single-member system makes by-elections, they are practically impossible in a system of proportional representation.

These, then, are the main issues involved in the question of electoral systems. Where they are of less importance than they have seemed to us in this discussion, for instance, in municipal government, where the area is necessarily small, then the weight to be given to the various factors may be different from what we have ascribed to them. Let us, however, not forget that the question is not only soluble by reference to the representation of opinion and feeling in the legislature, *but the making and unmaking of Governments.*

Direct Legislation. The difficulties of representation have led, among other things, to the demand that parliamentary and party

government shall be at least mitigated, if not displaced, by the direct action of the people. The maximum demand (as in the Bolshevist theory of government [1] and that prevalent in some American States) [2] is for the right to elect and recall, at short intervals, *all* the officers of government, judicial and executive, as well as legislative. A more moderate demand is for Direct Legislation, that is, the Referendum and the Initiative. In both of these devices the people are (formally) called upon immediately, and not through the intervention of political parties, to record their votes on projects submitted to them; but, in the first, a parliament refers its work to the people for approval or disapproval, while, in the second, the people have the right to initiate a proposal, and this, upon various conditions, is submitted to the people for approval or disapproval. In other words, by the Referendum, it is intended that the people shall have the opportunity of passing judgement upon a Bill which has already been dealt with by the people they have elected; by the Initiative, that they shall be able to introduce legislation which their elected representatives have not for some reason already handled.

Now as soon as these institutions are examined, it will be seen that their merits are built upon deficiencies in modern parliamentary systems. The arguments were most fully adumbrated, in relation to a practical Constitution, in the German Constitutional Assembly of 1919. Direct Legislation was recommended to correct the internal difficulties of Parliament resulting from the fragmentation and uncompromising attitude of political parties. These difficulties produced either unholy partisan arrangements, giving a majority to an accidental coalition, when the result ought to be referred to the people, or prevented legislation from getting beyond the initial stages. In other words, the party system may be so lacking in suppleness that it splits up the general will, and the only way to get back to it, is to take proposals directly to the people. The fear of the temporary majority unfairly rushing into legislation is very strong. Next, as in the example of the Australian Constitution, Direct Legislation was recommended as a device for breaking a deadlock between the two Chambers. This, of course, is an old claim of the British House of Lords. It was, in fact, apart from the use of Direct Legislation in constitutional amendments, proposed by Preusz as the *only* occasion for the use of the Referendum in the German Constitution.[3] Thirdly, Direct Legislation was proposed as a corrective of the petrifying effects of Proportional Representation, it being argued that the system used in Germany would promote the permanent reign of a number of party officials and the hierarchy of leaders. These might be stupid and fly-blown, and

[1] Cf. Mirkine-Guétzevitsch, op. cit.
[2] Cf. Dealey, *American State Constitutions*; Dodd, *State Government* (Edition 1927).
[3] Cf. Chapter on Constitutions, *supra*.

the means to make a fresh wind blow was a direct appeal to the people.

Another argument which has been used in the development and propagation of these devices in Switzerland and many States of America, is the educational value to the people, and the simple faith in the spiritual value and intellectual soundness of the popular will. It must be admitted that neither of these arguments has been subjected to a really critical test. As to the educational value of Direct Legislation, *is this more educational than participation in general elections?* Only, I should imagine, if there were a campaign in a particular measure or measures much more often than there are general elections, and only if the party organizations were made to improve themselves to meet this formidable task, or if some other type of popular propaganda and organization arose in the place of modern parties. The argument, then, either does not face its own consequential difficulties, or else, if the referendum is only occasional, much less weight must be attached to the argument. As to the faith in the value and soundness of the popular will as contrasted with that will when operating through party organization and Parliament, ample discussion in the preceding chapter has taught that it is an illusion.

Finally, there is the belief of Conservative Parties that Direct Legislation is, on the whole, conservative rather than progressive. *What this means, and whether and why it is true or untrue, we explore* presently.

It is already clear, however, that the discussion of Direct Legislation cannot take place in a vacuum, but it must be put into this context: whether, on the whole, the complex of representative institutions (the parties, the vocational and cultural groupings, etc.), which already produces a very close approximation of popular will and legislative result, can be improved by Direct Legislation.

Let us begin by observing the actual conditions prescribed for the exercise of Direct Legislation. Distinctions are made between Constitutional, Ordinary and Financial Legislation. In most of the American States (but not in the Federation),[1] in Switzerland,[2] Australia, a constitutional amendment must be compulsorily referred to the people for their direct vote. We have already explored the reasons for this: *certain rights and obligations are considered to be so important that*

[1] The account relating to the U.S.A. has been obtained from Lowell, *Public Opinion and Popular Government* (2nd Edition); Holcombe, *State Government in the U.S.A.* (1922); Dodd, op. cit.; Haines and Haines: *Problems in Government* (1926). These books refer to the older treatises of Oberholtzer and others, which are, however, of small critical value.

[2] The account relating to Switzerland is from Lowell, op. cit.; Rappard, 'The Initiative and the Referendum in Switzerland', in *American Political Science Review*, 1912, pp. 345–66. Same author, *American Political Science Review*, 1924; Bonjour, *Real Democracy in Operation* (1922); Brooks, *Government and Politics in Switzerland*, p. 134.

a change is made especially difficult; we also showed that the essential aimed at is *care* in the legislative process, and that this is compounded of the actual electoral process, the quality of parties, the quality of the men and women in the parties, the nature of parliamentary procedure, and the general probity of the civilization in which these function. There is no escape from the conclusion, that whether a formal and compulsory referendum on constitutional amendments is desirable or not, depends upon the combination and relative quality of these elements in different countries. In England, as we have shown, the House of Lords, and the circles of whose mind it is a specimen, certainly believe in the desirability of such a referendum.[1] Its formal introduction involves the duty of writing the Constitution, and reforming the body which can demand such a referendum.

In Switzerland it is possible to initiate an amendment to the Constitution by petition of 50,000 voters: in many American States the popular initiative is a means of proposing constitutional amendments; so, also, in Germany, by the Constitution of 1919. In the first country the ancient practice of democracy, a peculiar product of the small size of the localities (called Cantons) and the comparative smallness of the social problems, produced the theory of the constitutional initiative; in America the causes were the idealization of the power and capacities of the plain people and the reformers' desire of overcoming the excessive corruption of the political 'machine'; in Germany, the sudden advent of a democratic system, the idealization of Swiss democracy by the Social Democratic Party and the Democrats, and the general scorn of the extreme Socialists and Communists for representative forms, as well, perhaps, as the belief in the possibility of revolutionizing the masses by frequent agitation, led, with hardly any permanent and deliberate intention, to the constitutional initiative.

On ordinary laws there is no initiative in the Federal Authority of Switzerland, somewhat surprisingly[2]: for most of the arguments which apply to the other forms of direct legislation would seem to apply to this: but the cantons have this form. However, the constitutional initiative is wide enough to include ordinary legislation when proposed as a constitutional amendment, and this, which is found in some States of the U.S.A. also, is a defect rather than a merit—to put ordinary laws into the Constitution. Several States in the U.S.A. have the ordinary initiative, the practice having been begun in 1898. In the German Constitution of 1919 the initiative on ordinary laws also appears. In America more States permit the initiated law to go

[1] Cf. Chapter on Constitutions, *supra*.

[2] Bonjour urges that the legislative initiative is not accepted because a direct legislative power in the people would infringe the Federal principle of legislation by the unitary element and the cantons concurrently.

to the people directly, than *indirectly* through the legislature first, for its amendment or counter-proposal. In America also, all the States having a constitutional initiative permit the direct placing of the Amendment before the people. In the Swiss Federation and in Germany the proposal goes first to the legislature. The American practice of permitting *direct* proposition to the people, has the serious potentiality of reducing the credit of the legislature and permitting badly drafted and unsound legislation.

In Switzerland, many American States and Germany, laws already passed may be referred to the people upon petition of a certain number of voters. This is called the *optional* referendum.

In all these cases no distinction is made between the natural subject-matter of one proposal or another, or on the grounds of the complexity or technical difficulty of the legislation. The ordinary conditions having been met, the people are sovereign, except in the cases where the result infringes a superior Constitution, as in the U.S.A., Switzerland, and Germany.[1]

However, there are cases in which direct legislation meets certain statutory or administrative limits. Thus in the Swiss Federation the referendum can only be applied to laws 'and resolutions of general application and which are not of an urgent character'.[2] This clause has been interpreted as excluding treaties, the budget, grants-in-aid for local improvements. A similar 'urgency' clause is found in the American State Constitutions [3]: in the German Constitution and in the State Constitutions there are also similar exemptions.

Now, what is the inward meaning of these limitations: urgency, general application, and finance? The makers and interpreters of constitutions have feared the ignorance or the selfishness of the voters. Have they had good reason for this fear? Experience shows that they have. The people have been irrational in regard to sanitary measures, on the grounds that their individual liberty will be limited, niggardly, and even spiteful, in relation to the salaries of public officers, inclined to get special advantages for their own locality without any account of the public cost, and steadily against the assumption of taxation burdens although prepared to receive public benefits.

Let us consider the results of experience somewhat more closely. (We leave Germany to the end for special treatment.) Numerically, the opportunities of Direct Legislation have been amply used in Switzerland and the American States, in some American States too often for the peace of the electorate, its interest in the subject, and its capacity to discriminate and judge. In Switzerland the Referenda

[1] Equally in a State within the German Reich. Cf. Fleiner, *Schweizerisches Bundesstaatsrecht*, p. 274 ff.

[2] Op. cit., p. 298.

[3] Cf. Lowell, p. 175: 'Urgent for the public peace, health or safety.' The power is freely used. Cf. Lowell, p. 175, and Dodd, pp. 517–19.

from 1874 to 1924 showed the Swiss people to be anxious for liberal political rights, severe to murderers, a drag on the process of centralization, in favour of tariff duties, occasionally anti-Semitic, a drag on State activity in the control or management of industries, supporters of domestic virtue (in the marriage and liquor laws), steadily austere (especially in the Cantons) in relation to the payment of public officials, and unenlightened regarding public health measures. On the whole one may say the effect has been conservative; or, in other words, the assemblies were ahead of the people. Moreover, the people have certainly not acted spontaneously, but have, in fact, been incited and whipped up and informed by the same processes of electoral campaigning by political parties and ancillary organizations as we find in democracies without Direct Legislation. In the American States Direct Legislation has fairly effectively coped with the organized spoliation of the public by industrial, commercial and financial bandits, and effected constitutional reorganizations; apart from this, a generally conservative and parsimonious attitude was adopted both to proposals emanating from the legislature, and more so, naturally, from the groups of reformers who initiated proposals. Appropriations for education, and proposals involving taxation, and the principles and machinery of taxation, have been treated conservatively.

Now these very results might confirm the belief of some people in the virtue of, at least, the Referendum. On what is this obvious conservatism based? It is due to the natural selfishness of the individual who can only be made to bear a social burden if he is thoroughly informed as to its meaning, its individual benefit to him as well as the social benefit it will produce, or, failing this, if he is either induced to trust certain leaders who can take a broader view than he (especially as the main burden will be not on the leader but on *other* people), or, again, if he is simply compelled by those who know better. Direct Legislation places the weight upon the first of these factors; and since, as we have seen, the average elector is not educated or naturally apt to place confidence in this factor, without at the same time radically altering almost every present form of living and formal and social education and culture, is to place confidence in people who do not merit it, and who forthwith become the natural prey of political parties and other associations who, in most cases, think for them and force them into paths the character of which they cannot independently understand. We have already shown that the politician succeeds by window-dressing and the offer of free pleasures and the pretence that there are no burdens to be borne. In most cases, that is, at the present stage of democratic development, unavoidable: otherwise the people would destroy themselves.

These considerations are borne out by observation of the actual

voting in Direct Legislation both in Switzerland and America. Broadly these conclusions emerge: that the percentage of voters is small, the average being a little over 50 per cent., this rising to as much as 70 per cent. and 80 per cent., in issues which stir the moral conventions or the property instinct, and falling, though rarely, to 20 per cent. and lower where important but technical issues relating to administration are involved; that the votes in Direct Legislation are most usually between 10 per cent. and 20 per cent. lower than those for candidates for legislative and administrative office; that the votes are often exceedingly close, and this, combined with the smallness of the total vote, often results in a change of the law by a minority of voters. It seems quite clear from the accumulated results in both countries that an extensive and real opinion prevails and can be expressed on the primary and elemental issues, such as are embodied in the Ten Commandments, as, for example, on drink, crime, dislike of the foreigner (whether individual alien, the central authority or another State), covetousness of property, woman suffrage, factory regulations of an obvious kind, Sabbath observance, but as soon as subjects are mooted for the judgement of which a careful process of bringing back to first principles is needed, the voters are clearly at sea: for example, in the question of jury trial, the extension of educational opportunity, constitutional devices like proportional representation, the voters are baffled without special instruction. Not that the first class of subjects does not merit or require thought, but the prejudices upon them are so widely shared and intensely believed to be true that many people will vote, and decide. This does not prove that the result is good.

When we ask then, what good has Direct Legislation done in the countries where it has been actually used, the answer must surely be that these countries, save for the combating of the dishonest 'bosses' in the American States, are no better off, and are probably worse off. This is certainly the opinion in America. The Swiss idealize their system more than the Americans, but when one examines their opinions they are seen to be of small substance. Consider the utterances of Bonjour[1]: 'It is the surest method of discovering the wishes of the people—an excellent barometer of the political atmosphere.' But we have seen that the people's wishes can be destructive, when they have not met together to discuss the consequences of their activity and are not enlightened by those who are wise and informed. He proceeds: 'It compels the legislator to conform with the aspirations of the people, if he does not wish the fruit of his labours to perish.' But the legislator's fruits may be so good that they ought not to perish, and the aspirations of the people may be uninformed, unintelligent and vindictive. 'It puts an end to acute conflicts between people and

[1] Op. cit., p. 114.

governments, and provides one of the safest barriers there can be against revolutionary agitation.' To this the answer is that the conflict is ended by brute force—that is a majority decision, which has in some cases been an exceedingly small majority, and sometimes a minority of the whole electorate; and as for a barrier against revolutionary agitation Bonjour himself says (though in regard to the Initiative) that in the direct war tax proposal 'the Socialists made their appeal to the lowest instincts of human nature'.

Nowhere is proof adduced that legislatures or parties are better or worse since the introduction of Direct Legislation. As to the theory that the people are educated by the campaign, even in the few American States where 'publicity pamphlets', containing arguments for and against the proposals, are officially circulated,[1] it is hardly more than cant to pretend that the people receive an addition to their political education, and, in fact, the account of Direct Legislation in both countries shows more blinding and deception than quiet rational explanation of the proposals. Moreover, in some American States, a large number of referenda are voted upon at a single time: happy, indeed, the country with a people that could distinguish the proposals and utter a true judgement upon each. The people have, in fact, been sometimes gulled by an attractive clause deliberately placed early in the bill. Hence, either the parties rule; or no one rules but unadulterated prejudice; or small coteries step in and win a decision without continuous responsibility. Further, the existence of the appeal to the people has been used in Switzerland by minorities to blackmail the majority into concessions which have been made to save trouble, but not to act virtuously.

When, therefore, we have discounted the special reasons for Direct Legislation in the extraordinary corruption of American politics, the flaws in party organization; when we have allowed for the comparative simplicity of the issues in small territories; when we subtract the effects of the 'urgency law' and financial limitations, when we examine critically the patriotic enthusiasms of those who so applaud the favourite institutions of their own country—we are left with the belief that these countries would be better off if the voters concerned themselves more with exercising a choice of legislators through the process of nomination in their respective parties, a matter for which they seem to have a greater propensity, and which we believe they are better able to do—to learn to choose some one whom on the grounds of honesty, capacity and consonance with their general point of view and interests they can trust. This, I think, leads to emphasis on the party system as the medium of government,—especially for large States with complex interests, and greater difficulties to the propagandist.

[1] On this compare Lowell, op. cit., and the *Referendum in Oregon*, by Barnett (1915).

Let us now consider the special case of the German Reich. Direct *Legislation is introduced and regulated by Articles 72–76 of the* Constitution,[1] and the necessary laws prescribing the details of the process.[2]

There are five cases in which legislative projects may be referred to the people:

(*a*) At the request of one-third of the full membership of the Reichstag the promulgation of a law is postponed for two months and one-twentieth of the electorate may demand a referendum.[3] The intention of this is to give a substantial minority the opportunity of challenging an unreasonable and violent use of the majority's power.[4] The original form of this provision was the referendum at the direct option of the people, without any intervention by the Reichstag. Preusz did not propose this. It was proposed by the more radical socialists; the moderates and the representatives of the Right, however, obtained the modification of the original proposal, in order to prevent the instability which would result from a direct optional referendum. Moreover, in order, again, to prevent a minority from being unduly obstructive, Article 72 provides that this shall not apply to any law which both Reichstag *and Reichsrat* declare to be urgent. However, the President of the Reich then has the power of deciding whether, nevertheless, the law shall be submitted to the people for the process preliminary to a referendum. This possibility has been used twice: once in 1925 when the Law on Devaluation was passed. This law had serious social effects in its attempts to regulate the situation of loans, contracts and other financial engagements which had occurred during the period of inflation. Whether the situation were ignored or legislatively remedied many people were bound to be seriously affected—so much so, in fact, that there still exists a political party of 'the sufferers by devaluation'. Reichstag and Reichsrat declared the urgency of the law,[5] and the President, on the recommendation of the Ministers of Justice and Finance, decided to promulgate the law.[6] Secondly, in February, 1926, the statute on the Simplification of the Law of Military Penalties, an actual *majority* of the Reichstag voted against promulgation.[7] This resulted in negotiations, the amendment of the law, and its promulgation in a new form.

This Article constitutes a source of instability, especially since only one-twentieth of the electorate are needed to produce a referendum. It throws difficulties on the Government, in really difficult matters, for

[1] Cf. the Commentaries on these Articles in Anschütz, Poetzsch-Heffter.

[2] *Gesetz über den Volksentscheid*, 27 Juni 1921, etc. The best description and commentary is Kaisenberg, *Volksentscheid und Volksbegehren* (2nd Edn., 1926).

[3] Arts. 72 and 73, Clause 2. [4] Cf. *Bericht und Protokoll*, p. 308 ff.

[5] Cf. *Stenographische Berichte* (Reichstag), 15 July 1925.

[6] Cf. Purlitz, *Geschichtskalendar*, 16 July 1925.

[7] Cf. *Stenographische Berichte*, 18 March 1926.

it would steadily need to convince two-thirds of the Reichstag (originally), and it strengthens the Reichsrat by giving it a power of co-operation in the declaration of urgency. Let us remember, also, that this Article goes together with a system in which the original proposal of a three-year term for Parliament was rejected in favour of a four-year term.

(*b*) Article 73, Clause 1, gives the President of the Reich the power to submit any law, within one month after its passage, to a referendum. In a later chapter [1] we show how, even in Preusz, the spectacle of defective parliamentarism in other countries had created the desire to establish a powerful and directly-elected President to act as a check and balance in relation to Parliament. This Article is in the same order of ideas,[2] and was carried at the instance of Radical Democrats and Socialists. The intention was to give the President an independent discretion to challenge the law-making faculty of the Reichstag and thereby bring in the people to redress any fault—in their view. The power was given partly on the grounds that the President was himself directly elected by the people—hence of authority equal with the Reichstag. The queer thing is that the action of the President is deemed to need ministerial countersignature.[3] Thus the President is given an independent right to raise the question, and demand the Cabinet's agreement; but he has no constitutional power to enforce his demand, except to dismiss an unobliging Cabinet. Whether he does this must depend upon the general balance of political forces of the moment, such as those we describe later in the chapter on the German Cabinet. No doubt this is a power to be used only when a law has been passed by a bare majority and in abnormal and transient circumstances. The constitutional right, at any rate, adds to the prestige of the President. The right has not yet been used.

(*c*) The Referendum is used as a means of settling a conflict of opinion between the Reichstag and the Reichsrat. This we have already discussed in the chapter on Federalism in Germany since 1918.[4] The power to submit to the people on this basis has not been used.

(*d*) Article 73, Clause 3, admits the Popular Initiative or Request (*Volksbegehren*); all the other cases of direct legislation are Popular Decisions (*Volksentscheid*), since the initiative to call in the people is taken by some other institution. The Article reads:

'Further, a referendum is to be held if one-tenth of the registered voters demand it after the submission of a project of law. Only an elaborated project can be the subject of a popular initiative. It is to be introduced before

[1] Chapters on the Cabinet and Chiefs of State, *infra*.

[2] *Bericht und Protokoll*, p. 308 ff. Preusz did not propose this. He was, on the whole, against the Referendum. But he said that he had had in mind a Presidential Referendum.

[3] Thus Anschütz, op. cit. (Edition 1930), p. 337.

[4] *Supra*, Chapter X.

the Reichstag by the Government with an explanation of its own attitude. The referendum shall not take place if the desired project is accepted by the Reichstag without amendment. Only the President can permit referenda on the Budget, laws regarding taxation and regulations regarding salaries.'

This Article has been used several times and it is, in fact, a very mobile element in the Constitution. Taken together with Article 76 it permits direct legislation on ordinary matters and on constitutional amendments.

Let us, first, observe the limitations of the Initiative. (*a*) There are excluded certain subjects relating to finance. These limitations resulted from two motives: the conviction that the people could not know sufficient of law, administration, and public and private finance and economics, to give a rational decision on the subject, and the fear that the organized groups either favourable or hostile to central and local civil servants would too often attempt to upset the existing situation. The financial limitations have been quite broadly interpreted in practice, as we shall see, and the broad interpretation finds a majority of defenders *among lawyers*.[1] In this interpretation it is interesting to find adduced the experience of various countries, and of England in particular, where the initiative in finance is either located in the Government entirely, or Parliament subjected to severe limitations,[2] and the considerations which there hold good certainly hold good of direct legislation *a fortiori*. (*b*) The second class of limitations comprehends the special majorities required. Thus: where a referendum is in challenge to a resolution of the Reichstag, a majority of the registered voters must have participated in the referendum (Art. 75): that is, the referendum has no force at all unless at least half the voters poll valid votes. The reason for this provision is, when we remember American and Swiss experience, obvious. It gives rise, however, to the tactics during a referendum of telling those who are against a project simply to stay at home and not register their votes. Further, where, according to Article 76, a referendum with the force of a constitutional amendment occurs, *its acceptance* by *the majority of the registered voters* is required. Thus those in its favour need over one-half of all the registered voters positively for them. Again the tactics of the opposition is to tell voters to stay at home, and to argue that the initiated project is a constitutional amendment. What is a constitutional amendment has also been rather widely interpreted.

Experience of the Referendum under Articles 73 and 76. Up till September 1929, there were seven 'popular' initiatives.

[1] Cf. the discussion by Carl Schmitt: *Volksentscheid und Volksbegehren* (1927). Naturally, they are not convinced of the legislative capacity of the people. This attitude is of a piece with their vindication of the judicial right to review the Acts of Parliament and the Executive for its constitutionality. Cf. Chap. VII, *supra*.

[2] Cf. Chap. XIX, *supra*.

Upon two only has the full procedure [1] been carried out, the rest have been abortive. The first abortive popular initiative was that of the Reich Federation for Housing and Leaseholds 'to amend the law on Housing'. It was accepted by the Government, but its promoters themselves dropped it.[2] The same association proceeded with a new proposal, and this was rejected by the Government as a finance law. In April, 1926, the Association of Small Savers initiated an amendment of the Devaluation Laws. It was rejected by the Government as a law affecting the Budget. The Government argued that 'a law which materially amends the whole financial situation is inherently and without a doubt a law affecting the Budget. . . .' [3] Schmitt [4] holds that the term 'law on the budget' properly refers to any law 'the substance of which is by monetary measures to provide new income for the State's finances or to put new burdens upon it'. In 1927 the Reich Association of those injured by the Devaluation of Money [5] initiated a measure to return to the monetary valuations of debts, contracts, etc., before January 1924. This was rejected by the Government on the grounds that a finance law was involved.

The Government's interpretation of the financial and constitutional nature of an initiative is final, the constitution having provided no other authority to decide this or to act as a court of appeal.

Two initiatives have gone through all prescribed stages: the Referendum on the Expropriation of the Princes, 1926,[6] and the Referendum on the Young Plan of 1929, or, as it was cleverly termed by its promoters, The Freedom Law, or the Law to Prevent the Enslavement of the German People.[7]

The Referendum on the Expropriation of the Princes was supported by the Social Democratic Party and the Communist Party. It provided for expropriation without compensation, the amount thus saved to pay for social welfare arrangements. Parliament had not been able to settle the question owing to the disintegration of the parties and the impossibility of compromise. The joint committee applied for permission to initiate; this was granted without the production

[1] The procedure is provided in the Law Relating to the Referendum, for which see Kaisenberg, op. cit., and the law relating to voting procedure at general elections; cf. Poetsch, *Jahrbuch des Öffentlichen Rechts*, 1925.

[2] This led to the rule that after six months an abortive initiative lapses.

[3] Cf. Purlitz, op. cit., at proper date; Kaisenberg, *Zeitschrift fur Öffentliches Recht*, VI, 186 ff., on the various issues and interpretations involved. The organizer of the Association of Small Savers, Dr. Best, wrote an article on the subject the title of which, very naturally, was 'Suppleness of the Law and Breach of the Constitution' (*Rechtsbeugung und Verfassungsbruch*).

[4] Op. cit.

[5] Cf. *Reichsarbeitsgemeinschaft der Aufwertungsgeschädigten*; Poetsch, *Jahrbuch*, 1929, p. 136. In the text I have omitted mention of the Communist Party's Initiative of October, 1928, demanding the cessation of work on the armoured cruiser. It failed for lack of support in the preliminary stage.

[6] Ibid. [7] Cf. Merk, work cited on p. 937, *infra*.

of 5,000 supporting names (which the law requires in the case of apparently weak organizations). Two weeks is the time allowed for the registration of the supporting voters—the preliminary process as it is called. One-tenth the voters are required for endorsement: about 4 million. In fact, 12·5 million entered their names. The process of canvassing is paid for by the promoters: the public pays the expenses of the returning officers. In April, 1926, the joint committee produced a bill in very terse terms, and it then became the duty of the Government within three months to introduce it before the Reichstag. This was an exceedingly disturbing and unwelcome task. This was done, and the Government declared the initiative to be of a 'constitutional' nature, since it affected the right of property declared in Article 153 of the Constitution. The Reichstag suggested amendments: none was acceptable. Hence the project put by the Joint Committee went separately to the poll of the people. The question arose, if the Reichstag suggests amendments, in what form can a popular vote occur: shall the people be asked (1) to reject both or (2) to accept either one or the other; of course, they could not (3) accept both. Further, shall there be two stages to decide (1) or (2) or only one stage? For the time being it has been decided to have the one-stage procedure, for simplicity's sake; though it is recognized that some proposals would require two stages. The Referendum then occurred on a plain Yes or No on the original proposal. The promoters found the cost of their propaganda: their opponents were compelled to find the means of defence; and the official costs were met out of public funds. Nearly 20 million affirmative votes (one-half the electoral register) were required to accept the law: in fact, only 15 million voted, of which one-half million were invalid. The initiative was defeated.

In October, 1929, the extreme nationalist organizations, under Hugenberg, and the leaders of the Stahlhelm initiated a proposal rejecting the Young Proposals, prescribing certain lines of foreign policy to be pursued by the Reichstag. The proposal was, according to some jurists, notably Anschütz, a finance law, since it would have placed an additional burden on the Budget by bringing into force again the Dawes Plan. It should therefore have been disallowed. Other counsels prevailed, namely, that it was admissible on financial grounds (apparently), but it amended the Constitution by *contradicting the principle of the separation of powers*, since the Reichstag was ordered to conduct foreign policy, which according to Article 45 of the Constitution was a Presidential power.[1] Therefore a majority of the electorate must be obtained. A little over the necessary one-tenth were obtained in the preliminary procedure. The Government secured the rejection

[1] On the constitutional issues raised by this referendum see Merk, *Zeitschrift für Öffentlichen Rechts*, 1930, p. 83 ff.

of the draft in the Reichstag. In the final vote only 6 million votes were registered, and the proposal was thus defeated.

The interesting features in these two referenda are the answers which they provide (tentatively) to certain questions which political scientists have long asked in those large States where the referendum has been proposed.[1]

(*a*) Is the vote on the referendum materially different from the distribution of votes as given to the political parties at the immediately preceding General Election ? It is not. In the election of December, 1924, the Majority Socialists and Communists alone had together polled 10½ million votes; these parties managed the referendum campaign, and the votes in its favour amounted to 14½ million. In the second instance the general electoral vote and the referendum vote were even closer.

(*b*) Do the political parties keep out of the campaign ? On the contrary. They enter with all their apparatus of propaganda, their appeals to party loyalty, and arguments which relate the proposition to the general policy of the party. In both examples, two parties, the extremes on each wing, actually initiated the proposal. From the first moment each party declared its attitude and to the last advised and marshalled its rank and file. In the second instance the German National Party was split by the action of the extremist Hugenberg: the left wing of the party seceding on the ground that such extreme action tended to make impossible any governmental coalition between the party and other non-Socialist conservative groups.

(*c*) In what sense, then, is the initiative popular ? In no sense different from the issues which are treated by the parties through the medium of Parliament and General Elections.

(*d*) Was the issue 'clear-cut' from all others ? If so, the referendum is a useful remedy against the alleged defect of representative government that it is based upon elections where the multiplicity of issues confuses the electorate and destroys the sense of the mandate. The issues here were certainly not clear-cut. They were made part and parcel of a general system of constitutionalism, the theory of private property and Socialist reconstruction, of international affairs and public finance as a whole. They were related to the programmes and policies of the parties. The most significant example of this was the ten questions put in the Reichstag speech by Dr. Curtius in defence of his Government's refusal to accept the referendum project to those who proposed the Bill[2]: 'If the proposal is accepted, what will be the next step ? If such an alternative is accepted, what is the answer to the following questions which will arise as a consequence ? At

[1] See, for example, Dicey, *Introduction to the Law of the Constitution*, pp. xci ff.; J. St. Loe Strachey, *The Referendum* (1930).

[2] Cf. Speech, Reichstag, *Stenographische Bericht*, 26 November 1929.

such a stage what steps will be taken by the proposers ? ' and so on. He thereby showed that upon any Government there is imposed the task of answering the question proposed in the referendum only when its *sequelæ* are envisaged and a sound answer is provided and, of course, that there are unavoidable and closely integrated consequences.

(*e*) How does the referendum affect the position of a Government based on parliamentary responsibility ? The Government is seriously embarrassed and confused. Its programme of legislative work is suddenly interrupted by the necessity of aiding or opposing an enormous agitation towards which, by the Constitution, it is bound to state its attitude. Further, in a system based on coalitions of more than two parties, often precariously balanced, the result is, at the least, to heighten the instability of the Government, and to cause confusion, personal and group collisions, which cost energy to overcome, often without success. The referendum has no pacifying effect : on the contrary, it awakens antagonisms by reminding men of their existence.

(*f*) Did the referenda threaten the prestige of Parliament ? The answer is, decidedly ! For one of the most effective weapons of the parties and committees is denunciation of the parliamentary system and that particular Reichstag : it is a body of talkers, it can come to no decision because of the fragmentation of parties, it is congested with legislative and administrative duties, it is unjust, it has no courage. The weapon was used without mercy.

(*g*) Were the referenda educational ? In so far as they meant extra campaigns of public speaking, a special overflow of printed discussion in newspaper and pamphlets, the answer is affirmative. But can we be so sure when we take into account the *character* of the propaganda ? You either appeal to prejudice or you teach : if the former then there is no education, and in the instances confronting us there was an almost absolutely unbridled appeal to certain simple but powerful prejudices : property or not, a violent assertion of patriotism or not. Here are some of the titles of pamphlets in the Princes' Expropriation Referendum : ' Property is theft ! ' ' Five Hundred Years of Robbery by Princes ! ' ' Not a penny to the Princes ! ' ' Rich Princes, Poor People ! ' ' Law or Robbery in the Republic ? ' In the second instance, the very name of the proposal : the ' Freedom Law ', and the ' Law against the Enslavement of the German People ' were irrational incitements. The proposers have every inducement to be virulent and unmeasured and nothing to restrain them like subsequent responsibility. Ministers were subjected to the cruellest abuse, and being in office, were handicapped in their replies. It must be admitted that the people learn something from every additional dose of propaganda, but the dose is at least as bad as it is good.

Who will dare to say that in time they help the good and throw out the bad? If we contrasted what actually occurred with real education we should contrast two or three months' inflammatory and irresponsible demagoguery with a process which should last years, a process in which the proposal would have been explained in all its parts to small groups of people of no more than twenty, and its connexions with other parts of the existing body of laws and regulations carefully traced, its furthest ramifications and proximate and distant consequences weighed in terms of finance and subjective burdens placed upon various groups in the country and in foreign States, and the meaning of them all sedulously made clear. If education were the purpose, and a rational, considered, and sincere popular decision were required, these things would need to be fulfilled. In fact they were not fulfilled: for the time was not available, and instead of the teachers who would have been needed, let us say about one in twenty of the voting population (that is, two million teachers), there were simply a few thousand party speakers, special associations like the 'League for the Defence of the Seventh Commandment', and a handful of journalists. How many were made to realize that if they expropriated without compensation on this occasion rightly (let us say) they would have established a moral rule in the community not subject to careful discrimination when other groups were to be expropriated? How many were ever taught the results of attempting to force the hand of foreign Governments by peremptory commands to one's own?

(*h*) Finally, the referendum gave to the discontented parties the chances of agitation, not only for something just, but out of malice, spite and revenge for having suffered losses at the preceding elections and for their exclusion from the Cabinet. If it is said that the referendum is proper in the third or fourth year of a Parliament's life (and against that there is a great deal to be said), it must be observed that in Germany the referendum of 1926 was instituted by parties which failed at the elections of December, 1924 (in other words, the Reichstag had existed for only fourteen months when the referendum was proposed), while in the referendum of 1929 the Reichstag had sat for sixteen months and was again disturbed by the extreme Right which had done badly in the election of 1928.

Such experience would, perhaps, warn us not to accept Direct Legislation as a remedy for the defects of parliamentary government. It improves nothing: neither the laws nor the people. It disturbs without providing solutions. It is an appeal from a court which has the makings and some of the equipment of a wise legislature, to all the crudities of a majority vote, *and its operation leaves stark naked the physical power of numbers*, surely not a desirable thing. The public cannot but be ignorant of the facts of the situation and the referendum campaign makes it no better, and it may make it worse, for many

people are prepared to vote for what they immediately want without considering whether it is good for them or others in the long run. If, in spite of the teachings of experience, there are people who still say the will of the people ought to prevail, very well; but let it not be pretended that this is the best medium through which it may do so. If what we have said about the process of government in previous chapters is true, we should all be better served if our concern were fixed upon the reform of the party system; we should strive, then, to make the parties more responsible-minded, more sensitive, more masters of the social sciences, they would become conscious teachers, leaders and trustees chosen for the qualities proper to such functions and for that of legislator. At any rate, the question of the referendum is the question of the quality of a country's political parties.[1]

Non-voting and Compulsory Voting. Many people do not use their right to vote. A recent survey [2] shows that in England the percentage of non-voters is about 25 per cent., sometimes a little less; in France about the same; in Germany about the same; in the U.S.A. about 30 per cent. (in 1920 and 1924 over 40 per cent.) did not vote in Presidential elections, while Congressional and State elections show, on the average, a worse record. Why do not all the people vote? The best-formulated answer is that provided by Gosnell's study of non-voting in Chicago. To make this applicable to other countries would require considerable adjustment in the details and proportions, but its framework is representative of non-voters everywhere.

[1] The Referendum and the Initiative are included in all the State Constitutions of Germany, with many *differentiæ* (see the index of laws in *Handbuch des Deutschen Staatsrechts*, II, 218, note 40). The main constitutional provisions operative in Prussia may be given (Arts. 6, 14, 42, and Law of 8 January 1926, *Verfahren bei Volksbegehren und Volksentscheidung*, which closely follows the Reich laws of 1921 and 1926 on the same subject). The Initiative may have as its purpose (1) the amendment of the Constitution, (2) to make, amend or suspend laws, (3) to dissolve the State Parliament. The Initiative is proposed to the Government, and in cases (1) and (2) an elaborated project is required. One-twentieth the electorate is required in case (2), and in cases (1) and (3) one-fifth, to bring about a referendum. No Initiative is permitted on Financial Affairs (*Finanzfragen*: this is wider than the term in the Federal Constitution), Taxation Laws, Salary Rules. No referendum is effective unless a majority of the electorate has validly voted. If the State Parliament accepts the Initiative then a Referendum does not take place. Proposals to amend the Constitution or to dissolve the State Parliament require the assenting votes of *a majority of the electorate* to their acceptance. In other cases, an ordinary majority of the valid votes is sufficient. Voting is either affirmative or negative. The Second Chamber may demand an Initiative for the dissolution of the State Parliament (see Waldecker, *Die Verfassung des Freistaates Preussen* (2nd Edition, 1928). According to Article 42 a deadlock between the *Landtag* and the *Staatsrat* which cannot be solved by a second passage of the Bill in the *Landtag* by a two-thirds majority, then the *Landtag* may demand a referendum (cf. Waldecker, op. cit., Commentary on Article 42).

[2] Merriam and Gosnell, *Non-Voting*, 1924.

REASONS FOR NOT VOTING GIVEN BY NON-VOTERS INTERVIEWED

Reasons	Per cent. Distribution
Physical Difficulties:	
Illness	12·1
Absence	11·1
Detained by helpless members of family	2·2
Legal and Administrative Obstacles:	
Insufficient legal residence	5·2
Fear of loss of business or wages	5·5
Congestion at polls	0·8
Poor location of polling booth	0·8
Fear of disclosure of age	0·3
Disbelief in Voting:	
Disbelief in woman's voting	7·8
Objections of husband	1·0
Disgust with politics	4·3
Disgust with own party	2·0
Belief that one vote counts for nothing	1·5
Belief that ballot-box is corrupted	0·7
Disbelief in all political action	0·4
Inertia:	
General indifference	25·4
Indifference to particular election	2·5
Neglect: intended to vote but failed	8·4
Ignorance or timidity regarding elections	7·1
Failure of party workers	0·9

There is no doubt that many of the answers given were evasions designed to make the answerer less culpable than he or she was. For example, I should hazard the guess that 12·1 per cent. is too high for illness. As Vauvenargues said: 'Illness suspends all virtues and all vices.' Inertia provides for 44·3 per cent. of the total vote and perhaps this should be increased.

At any rate, is it worth while *forcing* all but the decrepit to vote? This is done in Belgium, Switzerland and Australia.[1] In the first-named country the compulsory vote was introduced in 1893 when the suffrage was very widely extended. Until that time the results of voting under a limited franchise were on a par with those in England and France, but in the local government areas the results were disturbing. But it was argued that the comparatively good results of voting for the central legislature were obtained only at the cost of propaganda and discipline extremely expensive in energy and money.[2] The opposing *theories* were (*a*) that the vote was a civic 'right' which

[1] Also in Argentine, Hungary, Denmark, Luxemburg and Czecho-Slovakia.
[2] Barthélemy, *L'Organisation du Suffrage*, p. 477 ff.

the citizen might use or not, as he wished; and (*b*) that the vote was a 'social right', that is, a right which is to be exercised in the interests of society and therefore society might regulate its employment. We shall meet such arguments again: arguments which lead back to their proponents' ultimate metaphysics of society and which are not seldom at least a partial product of their material interests. The strong practical reasons for the compulsory vote were the expense and difficulty suffered by the political parties in bringing the people to the poll. Moreover, the moderates were more afraid of the electoral inertia than the extremes: for the extreme voter would go to the poll voluntarily, not so the moderates. Thus, the Belgian voter is forced to vote, under penalty enforced by the justices of the peace. The fines are small, especially in post-war currency, but they seem to have been effective.[1] It is not surprising that the proportion of the electorate voting was always over 93 per cent. (except in 1919, for which adequate extraneous reasons can be given). Excuses accepted are illness, absence abroad, absence for business; and not many are prosecuted compared with the total of non-voters. In Switzerland some cantons have the compulsory vote, some not: in 1925 the cantons with it showed a poll of 86 per cent. of the electorate, those without it only 72 per cent.[2]

In Australia, the Commonwealth Electoral Act of 1924 [3] made it the *duty* of every elector to record his vote. Excuses may be made to the Returning Officers on a proper form which *must* be filled in by the non-voter. The penalty for inexcusable non-voting or non-justification is between ten shillings and two pounds. The effect of the compulsion may be inferred from the following figures [4]:

Election	Percentage of the electorate voting for Senate	Representatives
1901	53·04	55·69
1917	77·69	78·3
1922	57·95	59·36
*1925	91·31	91·39
1928	93·61	93·64
1929	—	94·85

[1] Cf. Gosnell, *Why Europe Votes*, 1930: 'The first non-excused abstention was punishable by a reprimand or a fine of from one to three francs. The second offence within six years was punishable by a fine of from three to twenty-five francs; the third offence within ten years by the same fine and public posting; and the fourth offence within fifteen years by disfranchisement for ten years in addition to a fine and public posting.'

[2] Gosnell, p. 129.

[3] Commonwealth Electoral Act (Compulsory Voting), No. 10, 1924. Codified with slight amendments, 1928, No. 17.

[4] From *Report of Royal Commission on Australian Constitution*, 1929, p. 31, and *Official Year Book*, 1930.

What were the motives for compulsory voting? Members of Parliament were disgusted by the abstentions. 'Ever since the federation was established, of all those who have been returned to the Senate during the last twenty-four years, on only four occasions has an individual senator been returned by more than 50 per cent. of the votes enrolled.'[1] How, under such circumstances, could members speak in the name of democracy and the majority? It was believed that if voters were compelled to vote they could the more easily be made to acquire an informed interest in politics. It was urged that the State already spent large sums of money to enrol electors. Further, 'If the people exhibit no interest in the selection of their representatives, it must necessarily follow, that in the course of time there must be a serious deterioration in the nature of the laws governing the social and economic development of this country. . . .'[2] It was pointed out that Queensland, which established compulsory voting in 1915, managed to poll over 82 per cent. of the electorate, while the rest of Australia polled about 55 per cent.

What does all this show? That it is possible to make people come to the polling booths and write a figure or make a cross on a piece of paper if they are threatened with the fine of a few shillings unless they do so. It enables the politician to say with conviction and demonstration that he represents a majority of the people. It makes it easier to get people to the poll. In some a political consciousness will be awakened. Notice, however, the substantial dangers: to vote, under duress, is no proof of the will to vote, capacity to vote, or right judgement. The politician may say he represents a majority of the people: in fact 30 per cent. or more have voted who do not care enough about politics to vote, let alone to inform themselves, except under duress. It is easier to get people to the poll. Is that for the good in politics? Is that not bound to make the task and therefore the efforts of political parties easier rather than harder? And there is a great deal to be said for imposing the greatest rather than the least strain on political parties. Finally, is it worth while to force a few into political paths at the cost of forcing the congenitally indifferent into giving an unavoidably ignorant vote?

Gosnell shows quite clearly that a high percentage of voters is, apart from compulsion, the result of momentous issues, keenly contested and closely contested individual constituencies, well-organized and active parties, the fullness of the sovereignty which is the prize of the victor[3]; and he establishes some correlation between propor-

[1] *Australian House of Representatives*, 24 July 1924, p. 2446.
[2] *Senate Debates*, 2nd Reading, 17 July 1924, p. 2180.
[3] Where there are constitutional limitations, as in the U.S.A., interest and therefore voting tends to diminish. The same holds good, of course, of local government, which is severely limited government.

tional representation and the size of the vote.[1] He shows also that there is more voting in urban than in rural communities; among skilled than unskilled workers.

Hence, when scholars like Barthélemy [2] advocate the compulsory vote one is astounded at the argument:

'Abstentionism falsifies the sincerity of universal suffrage and prevents the normal operation of government by the majority; what becomes of representative government in a country where one-third of the electors do not vote? The deputies—for we must take into account the votes obtained by the candidates who failed—do not represent the half of the electorate, and it is the half plus one of this representation which governs the country. Forty million Frenchmen are subject to laws voted by the elected of two millions of citizens.[3] Under these conditions, the supposed national representation gravely risks being only a singularly unfaithful expression of the essential features of the nation. There is, further, a powerful interest in obtaining the votes of the mass of citizens who do not use the pointer of political passion. The obligatory vote brings to the polls the *moderate* voter, and favours the moderate parties which are often less well organized for the electoral struggle than the extreme parties.'

Is this not a complete abdication of political science? The professor proceeds: 'Once again, the obligation to vote is part and parcel of customs in Belgium; it produces no discontent there; *it is an excellent means of civic education.*'

There is no help for representative government in the devices suggested by the means we have reviewed in this chapter. They either ascribe to the elector capacities which he does not possess and cannot possess, and seek to overcome the alleged defects of political parties by obliging the citizen to undertake functions for which he has either no interest or no aptitude. They forget the advantages of division of labour, and do not take account of the numerous agencies of public opinion other than the electoral process; they have moreover, the grave disadvantage of not procuring the voters' attention to the conditions of improving the personnel, methods and purposes of political parties. Hope lies not in these devices, but in the more adequate selection and training of candidates for office.

[1] Yet, says Gosnell (p. 183) regarding Germany: 'It is true that the novelty of the system has now worn off and that its very stability has tended to lessen interest in voting, but the drop in the poll has been very slight.'

[2] Barthélemy, Rapport, Chambre des Députés, *Le Vote Obligatoire*, 1922, No. 4738, and *Droit Constitutionnel* (1926), p. 296 ff.

[3] Does he mean that if 70 per cent. vote then one-half of this, i.e. 35 per cent. of the electorate may rule, i.e. four million, and that of this only two million may represent the majority in the constituencies?

PART VI

THE EXECUTIVE: CABINETS AND CHIEFS OF STATE

CHAPTER XXII THE BRITISH CABINET
CHAPTER XXIII THE AMERICAN PRESIDENCY
CHAPTER XXIV THE FRENCH CABINET
CHAPTER XXV THE GERMAN CABINET
CHAPTER XXVI KINGS AND PRESIDENTS

The heart of a statesman should be in his head —NAPOLEON.

'Those who are in the Ministry of State must imitate the stars, which, though the dogs bark, do not refrain from giving light or pursuing their course such abuse should not be allowed to shake the Minister's probity, nor make him swerve from the resolute march towards the ends which he has proposed for the good of the State'—RICHELIEU

CHAPTER XXII

THE BRITISH CABINET

WE now approach the branches of government which are not comprised in the legislature, and which do not exercise the full and regular functions of the Judiciary, and these, for want of a better name, are called by one which obscures rather than reveals—the Executive. We have already indicated the principal parts of modern political machinery, namely, the Electorate, the Parties, Parliament, the Cabinet, the Chief of State, the Civil Service and the Judiciary. The middle terms, the Cabinet and the Chief of State together, comprise that which is called the Executive. Now we know that no deliberate, rational philosophy ever distributed the work of government among its organs; these were made and endowed with power, each according to separate contingencies. Hence the Executive comprises an assortment of functions which cannot be inferred from the name, but can only be known by historic explanation and enumerative description.

The evolution of the Executive need not occupy us long, for it has in many ways remained the residuary legatee in government after other claimants like Parliament and the Law Courts have taken their share, and we have indicated the history of the aggrandisement of these authorities in other places. It is most useful to look upon the Executive as the residuary legatee, for that explains the mixed nature of its functions and parts. In early times all power, of every kind, lay with the Prince and his narrow circle of advisers or intimidators. It not only executed, but planned, policy, and sat in judgement.[1] The movement for responsible government caused portions of the power to be taken over by other institutions, the remainder itself being subjected to certain norms of constitutional morality and

[1] Cf. Baldwin, *The King's Council in England during the Middle Ages* (1913); Dicey, *The Privy Council* (older than Baldwin's work and much exploded by it); Turner, *The Privy Council*; Viollet, *Histoire des Institutions politiques et administratives de la France* (1912); De Luçay, *Des origines du pouvoir ministériel en France. Les Secrétaires d'État* (1868); Chéruel, *Histoire de l'Administration monarchique en France* (1855); Dareste de Chavannes, *Histoire de l'Administration en France* (1848); Hinsdale, *History of the President's Cabinet* (1911); W. H. Smith, *History of the Cabinet of the United States of America from President Washington to President Coolidge* (1925).

controlled by the new organs. The Legislature, the Courts, the People, the Parties grew to marvellous dimensions, yet they never denuded the Executive, as the Monarch and his Ministers were called, clean of all but executive work. Even the fullest new-modelling of government, that in the American States and Federation at the end of the eighteenth century, established an Executive which was more than a mere executive. Even Montesquieu, as we have seen, counselled no complete separation. Law-making was abstracted, but some law-making yet remained; justice was removed to a securer residence, yet large powers were reserved; control over the permanent officials was vested in parliaments and courts too, yet not entirely; while the field of foreign relations has only in recent years shown signs of being relinquished by its ancient holder. Now the same tendencies which moulded the Executive in its modern form also caused the growth of a distinction between the Chief of State (the King or the President or the Governor-General) and the body of Ministers or the Cabinet, giving the former a principally decorative and symbolic position, which is combined with independence and permanence of tenure, while the Cabinet has been made and is politically operative, reproachable and removable, acting in fairly strict dependence on the elected legislature.[1] This is the Council of Ministers, or the Cabinet, sometimes also called the Government or the Administration, though these terms are a little wider than the former. Both these parts of the Executive have important functions, and though what holds good of one country does not exactly hold good of others, of all save the U.S.A. this is clearly true, that the most important political powers are exercised not by the Chief of State, but by the Cabinet. Since this is so, and since it has a closer and more vital relationship to the electoral, deliberative, and controlling institutions which we have recently discussed, we treat of the Cabinet first.

LEADERSHIP

If we have so far successfully described the nature of modern government, it is clear that leadership, continuous and acknowledged, concentrated and co-ordinative, adequately informed and equipped, is vitally necessary. In modern governments such leadership is resident in the Cabinet.[2] Leadership means active initiative in the creation of policy, together with the winning, the energizing and guidance of both followers and the actual executants of policy. But we have seen that this is fulfilled in part by casual members of the

[1] For the development of the system in the British Dominions see Keith, *Responsible Government in the Dominions* (1929).

[2] The name of the Cabinet in France is *Conseil des Ministres*; in Germany, *Reichsregierung*.

electorate, by Parties, by Parliament. However, none of these has *all* the qualifications required for success. What these qualifications are, we have indicated in the terms used above to qualify Cabinet leadership and distinguish it from simple leadership. Continuity produces knowledge, grasp and timely application, and a sense of responsibility for plans made and set in motion. Acknowledgement of authority imposes a sense of regular and normal *duty* upon the leaders and plants expectation in other political elements. The unacknowledged claimant of leadership works without beneficial stimulus, wasting energy upon assertion, and is always a little doubtful whether he dare. When leadership is not concentrated, suggestions may emanate from many sources, but there is no body to compare, collate and examine them, or judge of their appropriateness to the task. Further, leadership must be of a co-ordinating kind, for all branches of government are at times, and often continuously, vital parts of each other, and not to associate them is to produce confusion in function and service, and waste in finance and effort. Nor does the ordinary unspecialized electoral and parliamentary process produce adequately informed leaders; for this, a special contact with expert technicians is indispensable. Finally, to obtain all these qualities involves specific equipment in terms of meetings, discussion, and appropriate relationship with parliament, the Chief of State and the other principal political institutions. The body which, relatively to all others, best commands these qualities must win the full leadership in the State: and the body which normally does possess these qualities, more than any other, in the modern state, is the Cabinet. When the normal parliamentary and Cabinet institutions fail, the result is chaos or dictatorship; and the conditions of failure, as well as of success, will become plain as we proceed.

Now these are simple deductions from the technical nature of the work of the modern state and the present character of the electorate and the parties. But the essential spirit of modern politics, *Responsibility*, provides one more cause for the concentration of leadership in the Cabinet, for to concentrate is to point, and the electorate to-day needs an unfailingly clear hand to indicate who is answerable; while to distribute is to offer alternatives and therefore to require a judgement, but this, the electorate is as yet incapable of making.

THE GENERAL CHARACTERISTICS OF THE CABINET SYSTEM

It need not be argued that the political characteristics we have described may be and are combined variously in different countries, even where the same terms are used to name a system which is believed to operate like the British model. In fact, as the course of the analysis

will amply show, there are very significant differentia of aspect and purpose. Broadly, however, there are certain common qualities and purposes, which show themselves in the composition of Cabinets and in their functions. Cabinets are small bodies of men selected from among the leaders of the majority party or parties of the legislature, often, but not always, from members of that body, and holding office and exercising governmental power as long as, and in the measure which, the legislature permits. The people do not directly come into contact with the civil service, nor does the legislature; the parties impel, but do not formally lead, the legislature. They employ a special agency, a trustee, a delegation from among themselves, to mediate for them. If we had not already in mind that a committee is an expressly elected and delegated body, we might call the Cabinet a committee of the legislature: it is that, except that the process of selection is not express choice by the legislature, and is devious and complex, while the articles of delegation are rather vague and elastic. The members of this committee man the departments of state, each directing and controlling the every-day administration of one great branch of government activity. Collectively, they decide the execution of policy and the making of laws, the order in time of their items, how effectively the tasks shall be undertaken, how much money shall be spent, and in what way the money shall be raised. This includes both foreign and domestic affairs. They explain to Parliament their motives, intentions and reasons; pilot their projects towards parliamentary acceptance; answer for the march of administration, which, by their acceptance of office, is deemed theirs and only theirs; and they are responsible, that is, it is acknowledged that blame and praise will attach to them according as, in the opinion of Parliament and the interested members of the electorate, they work woe or weal. The whole apparatus of government, every factor in the creation and execution of political decisions, revolves around them, concentrates upon them, radiates from them, though often not with frictionless celerity or to the universal satisfaction, and, normally, with much grinding and clanking. So powerful is this body, so busy, so ubiquitous, that the charge of tyranny is levelled at it, and gloomy prophecies are made about the decline of legislatures. We have yet to see how much there is in such charges and prophecies; but this is true, that the energizing, responsible centre of government and ultimate decision is in the Cabinet. Let us consider these matters closer in regard to each country. When we do, we shall find that for various reasons, very potent in the past, but which may not persist always, the British Cabinet System, the mother of all, is the most efficient.

THE CABINET IN GREAT BRITAIN

The British Cabinet consists not of all, but only of the principal, Ministers of the Crown.[1] All the Ministers, together with the Under Secretaries and Parliamentary Secretaries, form the 'Government' or the 'Administration'. Which are included in the term 'principal' depends partly upon precedent, and partly upon the convenience of each government. Also the numbers vary within small limits, it being necessary to comprehend all the important branches, and to allow for Committees of the Cabinet to be formed without too much duplication of membership. An excess of numbers, however, causes the loss of the best psychological and physical conditions of effective deliberation. The number is, of course, larger now than it was in the beginning or middle of the nineteenth century, because the state has a wider sphere of activities.[2] Further, it seems to me, that the variation of policy in regard to the inclusion of the Postmaster-General, shows that importance is partly defined with reference to the possible range of variation in policy; an office, which, like the Post Office, has a rather limited range of controversial business and a vast range of mere routine, not needing the special attention of the Cabinet.

Ministers are Ministers of the Crown, that is they are formally appointed and dismissable by the Crown. But this action is hardly more than formal and symbolic, as we shall see more clearly later. The Crown appoints, but it does not choose; it dismisses, but it does not control; nor does it determine the occasion of dismissal. What is the power behind the Throne? It is the authority of the people to which government has been made responsible. The people almost

[1] Cf. Anson, op. cit. (3rd ed. 1907), Vol. II (The Crown, Pt. I), Chap. III, p. 210; Low, *The Governance of England* (rev. ed. 1915), p. 167; Morley, *Notes on Politics and History*, 3: 'The Cabinet, keystone of the arch, in size and in prerogative is not altogether safe against invasion. The great wholesome system of party is said to be melting into groups and coalitions. The growth of special interests, each claiming for itself a representative minister in the Cabinet, has turned it into a norm of multitude indeed, and a norm not wholly favourable to that concentrated deliberation when Pitt had first six, then seven colleagues, Peel twelve, and Gladstone fourteen. To-day we are a score.'

[2] Cf. Peel (*Mir. of Parl.*, 1835, p. 1797 Cited in Todd, op. cit., I, 283): '. . . the executive government of this country would be infinitely better conducted by a Cabinet composed of only nine members, than by one of thirteen or fourteen'. Lord Granville approved Disraeli's limitation of the Cabinet to twelve: 'I think in the formation of the present Government it was wisely decided to diminish the number in the Cabinet rather than to increase it. I remember a good many years ago, when a Government was formed by the father of the noble Earl opposite [the Earl of Derby] many members of our party regretted that he did not reduce his Cabinet to a much smaller number. Making the Cabinet unwieldly is not a good thing for the Administation' (*Hansard, Lords*, 22 May 1874, Vol. CCXIX, col. 694).

Cf. Lloyd George, *Hansard*, 19 Dec. 1916, col. 1342: 'You cannot run a war with a Sanhedrin. That is the meaning of the Cabinet of five, with one of its members doing sentry duty outside, manning the walls, and defending the Council Chamber against attack, while we are trying to do our work inside.'

There were twenty-one ministers in the Baldwin Cabinet of 1924 and nineteen in the MacDonald Cabinet of 1929.

exhaust their authority in the choice of Parliament, and this body, to which a large sphere of sovereignty is still ascribed by constitutional lawyers, applies the test of responsibility to Ministers. But we have seen that people and parliament are themselves organized and directed by Political Parties, that it is difficult, indeed, to discover the distinct identity of these three bodies.[1]

This trinity co-operate by continuous interaction in the selection of the leaders of the Party, and among them the Prime Leader. The Crown may, formally, choose anybody as chief Minister, but government will cease if the choice made by the factors of popular control is flouted. Hence the Crown cannot avoid entrusting the formation of a government to their indubitable choice. I say indubitable, for if there is any doubt, if there is an alternative, no rule exists, either in Statute or Convention, to bind the Crown to choose one way rather than another, and the question must needs be answered by reference to the practicability of the choice and the personal predilections of the King or Queen.[2] In England conditions have, since 1820, left little, though some occasional, room for doubt, and therefore hardly any for the personal choice of the sovereign. Before that time, there were no such agencies as political parties, but only fluctuating 'connexions' among leading families and the groups of interests attached to them, and this situation, lending aid to special rivalries,

[1] Cf. Gladstone, *Gleanings*, I, 224. 'This Fourth Power is the Ministry, or more properly the Cabinet. . . . No account of the present British Constitution is worth having which does not take this Fourth Power largely and carefully into view. And yet it is not a distinct power, made up of elements unknown to the other three; any more than a sphere contains elements other than those referable to the three co-ordinates, which determine the position of every point in space. The Fourth Power is parasitical to the three others; and lives upon their life without any separate existence. One portion of it forms a part, which may be termed an integral part, of the House of Lords, another of the Commons; and the two conjointly, nestling within the precinct of Royalty, form the inner Council of the Crown, assuming the whole of its responsibilities, and in consequence wielding as a rule, its powers. The Cabinet is the threefold hinge that connects together for action the British Constitution of King or Queen, Lords, and Commons. Upon it is concentrated the whole strain of the Government, and it constitutes from day to day the true centre of gravity for the working system of the State, although the ultimate superiority of force resides in the representative chamber.'

It is notable that Gladstone omits the Parties and the Electorate in this passage. He has already paid homage to the people—'It is enough to say in England, when the Nation can attend, it can prevail.'

[2] Cf Buckle and Monypenny, *Life of Disraeli* (new rev. ed, 2 vols., 1929).

[Note.—Subsequent references to this work will be to the vol. and chap of the 6-vol. ed., page references will be from the new ed. All biographies frequently referred to will be indicated by their short title, omitting the author's name.]

Derby made unsuccessful attempts to form a Government in 1851 and 1855. In the first case his failure was due to 'his lack of available statesmen' (p. 1102); and in the second, to the refusal of Gladstone and Herbert to join the Cabinet owing to Palmerston's refusal (Vol. III, Chap. XV, pp. 1379, 1380). This is also an interesting example of (*a*) the power of the Crown to choose among available statesmen, when a choice is possible, and (*b*) the political and personal bias of the Crown, for Albert and Victoria, on this occasion, did their utmost to keep Palmerston out of the Premiership (cf. Ashley, *Palmerston*; and Martin, *The Prince Consort*, III, 199 ff.).

together with the imperfectly acknowledged sovereignty of personal, or even of Parliament, gave the Crown considerable latitude.[1] Majority factions and 'connexions' turned into parties, the division turned more upon the principles of government. Then, when government became actively law-making and socially ministrant. principles more and more settled party allegiance, and singled out the man who best represented them.[2] When, finally, parties were specially organized on a basis of dependence upon the people, they became the selective factors, and providing they were not in doubt about who did and ought to lead them, the Crown could not be in doubt. In recent years the 'machine' and the parliamentary members and their prominent men have determined these questions without the shadow of a doubt at special conferences.[3] The development of the party caucus has relieved the Crown of an onerous task.

[1] Cf. Anson, *op. cit.*, Vol. II, Pt. I, pp. 97 ff.

[2] Yet the biographies of *Canning* (Stapleton), *Lyndhurst* (Martin), *Peel* (Parker) and *Disraeli* (to 1860) now reveal quite clearly how unsettled principles were, and more, how slight was the connexion between particular leaders and those principles. Could that be helped when England so suddenly took the plunge into a steam-driven civilization? Peel's perplexity and the drama of his career seem to show that the new world came too suddenly for men to realize its meaning until they had grappled with its problems for years.

[3] Cf. *Disraeli*, III, 951–7, William Beresford (Conservative Whip) to Lord Stanley, 22 Jan. 1849: 'I have discovered that the plan that they at present intend to adopt is not to propose D. as Leader in a general meeting of the Party, but being themselves organized to go down to the House, and for him thus backed to virtually undertake to be Leader, not by election but *de facto*. . . .'

Disraeli's leadership was treated as an accomplished fact in an official letter of the Prime Minister to the Queen (*Queen Victoria's Letters*, 16 March 1849), and further confirmed by the recognition of the Whip and members of the Government. 'Thus, *without any regular nomination or election, but by a natural evolutionary process*, the lead of the Opposition passed to the fittest.'

Cf. Gardiner, *Life of Harcourt* (1923), II, 258 ff.: 'When the retirement of Gladstone became imminent, it was evident that the question of succession would arouse great feeling. If the decision had rested with the rank and file of the Party in the country or with the majority of the Party in the House of Commons there is little doubt that the overwhelming claims which Harcourt's services and record constituted would have secured him the succession. But the decision rested with Harcourt's colleagues in the Government, and sensible as they were of his title they were equally sensible of the difficulties of his temper. Most of them had smarted under the whip of his formidable tongue and not less formidable pen, and his uncalculating emphasis in controversy took no account of consequences. . . .' Morley's support of Rosebery finally turned the scale. Cf. also p. 488 where it is noted that Campbell-Bannerman was definitely chosen as Leader of the Liberal Party at a meeting held at the Reform Club, 6 Feb. 1899. Cf. Spender, *Campbell-Bannerman*, I. Two other names—Asquith and H. H. Fowler—were withdrawn before the meeting. Baldwin was elected leader of the Conservative Party 'at a meeting of the Unionist members of both Houses of Parliament at the Hotel Cecil, 28 May . . . in succession to Mr. Bonar Law' (*Gleanings and Memoranda*, June, 1923, p. 631). Cf. also the situation of Lloyd George since 1922. Cf. also the automatic loss of the leadership of the Labour Party by Mr. Ramsay Macdonald, upon becoming Leader of the 'National' Government on 25 August 1931, and the election of Mr. Henderson to the position of Leader of the Labour Party on Friday, 28 August, by the Parliamentary Labour Party.

exhaust their years, also, the appointment of a Prime Minister was to which cult problem,[1] since not only was each party definite about which of its members should be called upon, but there were only two parties, one of which was necessarily in a majority. This happy condition is not enjoyed by other parliamentary countries, and the formation of a government therefore imposes a great, and often an impossible burden, upon the Chief of State, since none of the claimants can by itself give the assurance that it can proceed with the government for long, and the automatic guide of numbers for an enduring Cabinet does not exist. Since the rise to governmental, or as the Continental writer would say, 'ministrable', eminence of the Labour Party in England, there are three parties, and while this condition persists, even without aggravation by any further party groupings, it is never certain that any one party will be able to outvote a combination of the others. Hence, the former simplicity has gone. So far no remarkable anxiety has arisen, for in one case it was found that the Liberal Party could support a Labour Government in office, at least for a time, while in another case the Labour Party without having an absolute majority had the largest number of seats, and the numerical rule was followed, on the assumption that disaster would not, at least, be immediate. We shall see that Continental systems do not operate so simply, and their experience, which is now used as a warning in Great Britain, may one day be scanned as a necessary lesson.

The Prime Minister Makes His Cabinet. The Prime Minister, thus indicated, is entrusted with the formation of a government. Under contemporary circumstances he does not refuse, because he need not. He is well aware of his strength, whether it is in numbers as in majority parties, or in tactical situation, as in the Labour Government of 1929.[2] So far, it has not been necessary for a British Prime Minister, in contemplating the possibility of office, to make a formal pact of coalition with other parties, either by way of an

[1] Cf. the respective situations of Hartington, Granville and Gladstone after the Midlothian Election of 1880. Morley's *Gladstone*, Book VII, Chap. IX, and Victoria *Letters* (2nd Series), III, 73 ff. Gladstone had resigned the leadership five years before to Granville; Hartington had been elected to lead the Commons by the Party. The campaign had been won by Gladstone's passionate pilgrimages. The Queen objected to him as Prime Minister, on account of his 'violence and bitterness' in opposition. Hartington was sent for, on the grounds that he was Leader, but could not leave Gladstone out of a Cabinet. Gladstone, however, refused to enter a Cabinet except at its head. His popularity was too great for the Queen's personal wishes to triumph, or for Hartington and Granville not to accept his leadership and serve with him. Cf. also Fitzalan, *Granville*, II.

[2] When a large electoral landslide, a general desire for political stability, a feeling that Labour must be given a fair chance, and the temporarily cowed attitude of the Liberal Party, sadly disappointed at the elections, and voluntarily prepared with policies approaching those of the Labour Party, coincided to the advantage of the latter.

agreement on policy or sharing offices, both a notable contrast of Continental conditions.[1]

The Prime Minister's choice of colleagues is not controlled by the Crown, though on some occasions the personal aversion of the monarch has been the means of keeping men out of office.[2] Fortunate is it, that the Premier is unembarrassed by the personal wishes of the Crown, for his task is already formidable. The experience of 150 years teaches us what an extraordinary combination of considerations dictates the composition of a Cabinet. The Prime Minister seeks for capacity to manage the department, ability in general counsel, for creativeness. These are not guaranteed by mere cleverness; there are all the other qualities which distinguish men: industry, rapidity of intelligence, bravery, a peaceful character which compels others to quiet consideration by its mere presence, sincerity, and many others. All these are required, and the ideal Cabinet is the one in which there happens to be the proper amalgam of talent and character to serve the contemporary needs of the departments and the wants of the country.[3]

To-day, the demands are more exacting than at any previous time, for the amount and importance of governmental business is immense, the relationship of government and the economic and social pursuits of the country has become a blood-relationship, and the positive responsibility of the Cabinet is urged by almost every group and individual in the country, while criticism is continual and searching. Considerations of ability are important for the Chancellorship of the Exchequer only second to that of the Prime Minister. Is it not a remarkable illustration of the underlying importance of economics and finance? Perhaps another age may deem the Minister of Education or Religion second in importance only to the Prime Minister. But the confidence of the City is necessary, unless there are intentions radically to reform the economic institutions of the country, when City popularity, of course, could hardly be expected or solicited. Yet it is not upon capacity for the actual work of government alone that

[1] This situation, however, pertained during the Crimean War when Aberdeen's Coalition Cabinet was in office from December, 1852, to February, 1855. Upon the resignation of the Aberdeen Ministry, Palmerston attempted to reconstruct the Coalition Cabinet, but the Peelites (Graham, Gladstone and Sidney Herbert) resigned within less than a fortnight. Nevertheless, the period of political compromise only ended with the death of Palmerston in 1865.

[2] e.g. Queen Victoria 'was a little shocked at Sir Charles Wood . . . designating the *future Government*, and selecting Lord George Bentinck, Mr. Disraeli (!) and Mr. Herries as the persons destined to hold *high offices* in the next Government' (The Queen to Russell, 19 Dec. 1847). Cf. *Disraeli*, III, 1165, 1166; *Harcourt*, I, 464, on the Queen's dislike for Dilke, and Gwynn and Tuckwell, *Life of Sir Charles Dilke* (2 vols., 1917), I, 303.

[3] Derby had to refuse because he could not rely on sufficient men of capacity. Cf. *Disraeli*, III, 1375 ff., and *Queen Victoria's Letters* (1st series), III, 79, 80, Memorandum of 31 Jan. 1855.

exhaust the Minister may base his choice: Ministers must be good to wheers in order to satisfy the House of Commons and the House of Lords that their administration deserves the continuance of confidence; they must be able to deal with Opposition criticism, and, of quite as much importance, be good platform speakers and popular with the electorate. Often, it is better to include a mediocre brain and character: for though the country may suffer from the inferiority of talent for government, it may be led by other personal qualities to believe that all is well, and a party leader is entitled, in a democratic system, to believe that be his Cabinet never so bad, the curtailment of its life through lack of the arts of popularity, will ultimately cause the country to suffer if the Opposition is, as a sequel, called to form a government. There is the logic of the party system, and only when the people have learned to appreciate the better qualities can things be different.

Even now the perplexities of the leader are not at an end, for in the excitement and bewildered mentality of the decisive few days, he is made aware, with dreary and exasperating insistence, that certain people must be rewarded for years of loyal party work: [1] they have attended all committees, divisions, conferences, have spoken in every constituency, never criticized their leaders, or given trouble to the Whips. They must now be honoured. One way out of embarrassment is to give the compensation of a baronetcy or peerage.

Then the question arises: shall all branches of the party be represented, or only the substantial majority? Shall any attempt be made to include all representatives of the various great industrial groups? This especially arises in Labour Cabinets in England, since the Trade Union groups are so large a part of the Party; nor is it possible not to pay respect to those who have risen from social humbleness. In the Victorian Age the problem was to include the Castle and Vere de Vere; [2] the problem now is to include the Factory and Cottage, to the possible loss of aggregate efficiency. Another consideration gives pause: how far shall heretical groups be included? Shall they be conciliated by inclusion, or braved by exclusion? [3] It depends upon the Prime Minister's temperament, the extent of the

[1] Cf. *Peel*, II, 482 9, for the correspondence between Peel and 'disappointed' colleagues in 1841; *Disraeli*, IV, 328, 9, correspondence with Lord Chelmsford in 1868; *Harcourt*, II, 184. In 1892, on the formation of the Cabinet, Gladstone said, 'I am the man who has to do all the butchering'—referring to the exclusions and disappointments he had to cause; *Gladstone*, Bk. VII, Chap. IX (Cabinet of 1880); Fitzroy, *Memoirs*, II. Cf. also Gwendolen Cecil, *Salisbury*, III, especially Chap. VI.

[2] Cf. *Disraeli*, 1160: on the formation of the Derby-Disraeli Cabinet, 1852.

[3] In 1846 the attempt to include the Peelites in Lord John Russell's Cabinet (formed 5 July) was frustrated by Peel himself' (Disraeli in a memorandum); the result was a purely Whig Cabinet (*Disraeli*, Vol. III, Chap. I, p. 817). Cf. Spencer Walpole, *Lord John Russell*, I. So with the difficulties on the formation of the second Labour Government in 1929—the left wing were excluded by Mr. Macdonald.

cleavage, the size of the dissentient minority, and the personalities of the Prime Minister's counsellors and the leaders of the minority.

The personal likes and dislikes of the Prime Minister have great weight. Young men of about the same age and attainments must be treated about equally. Former membership of a Cabinet provides difficulties: an enemy will be made by exclusion, weakness may be the result of inclusion. But the Prime Minister is not a free agent. He has grown to leadership with others who are almost as good as he: possible substitutes, should something occur to prevent his accession to office. He is no Caesar; he is not an unchallengeable oracle; his views are not dooms. He is always on sufferance, and its terms are whether he can render indubitably useful service. At any time a rival may supplant him. The little group of leaders when in opposition are held together only loosely and the conditions of their loyalty are not permanently fixed. Friendship, confidence, and policy suffer transformations. One or two or three who are needed by a potential Prime Minister may make terms about themselves, and others, in regard to office and to policy.[1] There may even be stipulations

[1] Cf. *Harcourt*, II, Chap. XV, on the rivalry of Harcourt and Rosebery in 1894. In 1880 Chamberlain proposed 'an offensive and defensive alliance' to Sir Charles Dilke. The outcome of the bargain was Dilke's refusal to accept the Under-Secretaryship for Foreign Affairs unless Chamberlain was made a Cabinet Minister. Gladstone's objection to putting a young member, who had never held office, straight into the Cabinet was finally overcome, and Chamberlain became President of the Board of Trade. This was a victory also in regard to policy—a victory of the Radical wing. Cf. *Dilke*, I, 303-11, also *Harcourt*, I, 363, 364.

In 1905 Haldane and Grey refused to take office under Campbell-Bannerman unless certain conditions were accepted. Cf. Spender, *Life of Campbell-Bannerman* (2 vols.), II, 193, 194: 'But a very disagreeable surprise awaited him. Sir Edward Grey came again at ten o'clock that evening (Monday, 4 Dec.), and told him point-blank that unless he took a peerage and transferred his leadership from the Commons to the Lords, he (Sir Edward) would not accept office or take any part in the Government. . . . It was supposed at the time that both Mr. Asquith and Mr. Haldane were parties to this ultimatum . . .'

Cf. Haldane's *Autobiography* (1929), *Memorandum as to events in December*, 1925, p. 175, where this supposition is partly destroyed: Asquith had eventually consented to enter the Ministry 'in any event'. Considerations of patriotism overcame Grey's and Haldane's original decision—the former went to the Foreign Office, the latter to the War Office. Cf. Grey, *Twenty-five Years* (popular edn.), I, Chap. V. Cf. also the demands made by Rothermere as conditions of his support of the next Conservative Government (whether Baldwin remains leader or not). In a letter to Mr. Hannon, quoted by Baldwin on 24 June 1930 at a specially convened meeting of Conservative M.P.'s and candidates, Rothermere stipulated that he should be acquainted '*with the names of at least eight, or ten, of his most prominent colleagues in the next Ministry*'. . . . Baldwin continued: 'Now those are the terms that your leader, if returned to power, would have to accept, and when sent for by the King, he would have to say: "Sire, these names are not necessarily my choice, but they have the support of Lord Rothermere." A more preposterous and insolent demand was never made on the leader of any political party. I repudiate it with contempt, and I will fight that attempt at domination to the end.' (Cf. *Gleanings and Memoranda*, Aug., 1930, p. 122, reprinted from *Daily Telegraph*, 27 June 1930.)

Cf. *Lord John Russell*, I, 425 ff.: He refused the Premiership in December, 1845, ostensibly because Palmerston insisted on the Foreign Office, while Grey refused to serve at all if Palmerston obtained the Foreign Office. A few months later, however, he took the Premiership, and Palmerston and Grey agreed to serve together.

ing the nature of leadership. The interactions and the negotiations settle the terms of colleagueship, the respective offices, and the nature, sometimes even the holder, of the Prime Ministership.[1] But the indubitable Prime Minister, he who towers over his colleagues by reason of definite party selection, electoral popularity, character and talent, has indeed a great power over the rest, for he has office to give, and only those who have seen the flushed faces, the anxious shuffling and nervous twitchings, of the aspirants, can know what a mighty power over men is thus exerted. When office is their life-breath, we cannot be surprised that men pant for it: no spectacle of men in stress is pleasant. Thus, in the rather heated vagueness of an excited consciousness, do the Prime Minister and his colleagues associate in the formation of a Cabinet, not without the frenetic advice and persuasion of unofficial Tadpoles and Tapers; the African jungle is not the only place where men do a war-dance and beat themselves into a frenzy in preparation for a kill. Salisbury was even heard to say (from personal experience in the formation of a Cabinet): 'The Carlton Club resembles nothing so much at this moment as the Zoological Gardens at feeding-time'.

The Implications of Responsible Government. The principle of responsible government has certain institutional implications, and these are, in regard to the Cabinet system: that members of the Cabinet are, as a rule, members of Parliament; that they are necessarily members of the majority, whether of one party or of a coalition; that they hold office only while Parliament and the country do not obviously withdraw their confidence from a Minister or the entire Cabinet; that the Cabinet acts as a unit in face of other governmental bodies; and this implies a certain predominance of the Prime Minister over his colleagues. We more closely investigate these implications *seriatim*.

Ministers are Members of Parliament, that is, they are already elected or are found a seat upon taking office. There have been no exceptions to this, except the apparent exceptions of abnormal times. Such was the case of General Smuts who was made a member of the Imperial Cabinet in 1917;[2] but the exceptional position is obvious—the normal peace-time Cabinet system had been suspended and the special body, adapted to the supreme political direction of the War, which took its place, was called Cabinet from habit. It is clear

[1] Cf. Ashley, *Life and Correspondence of Palmerston*, II, 247: Letter of Palmerston to his brother, 24 July 1852: '. . . it seems to me that John Russell as well as I might serve under Lord Lansdowne, but I would certainly not serve again under Johnny, and Johnny, I should think, would scarcely serve under me, at least at present'. . . . Cf. also *Granville*, I, pp. 79 ff.; in 1859 Granville was obliged to relinquish the formation of a Government owing to the impossible demands of Russell as the condition of co-operation (ibid., 321 ff.).

[2] Cf. The War Cabinet, *Report for the Year* 1917 (1918, Cd. 9005), p. 6.

that the principle is not unintentional, and that it has certain consequences. It was definitely maintained despite the numerous Place Bills which were designed to exclude from the House those holding place under the Crown. Although it seemed obviously dangerous to an eighteenth-century assembly to suffer the sapping tactics of the King's friends by their formally proper appearance on the floor, and in the precincts, of the House, there was something to be said in favour of the efficiency of government which is the product of legislative and executive co-operation. Moreover, it often happens, that to exclude your enemies is simply to create a rival in an unassailable position,[1] whereas to command them into your continual presence is to have them under a surveillance, which does more than surprise their intrigues, for it irresistibly insinuates itself into their habits of thought, and attends, spectre-like, even in their private councils. It is simply the institutional application of the psychological truth: 'Out of sight, out of mind.' Hence the principle of membership of Parliament has remained in England,[2] and where it has not remained, as in the U.S.A., special arrangements have had to be established to secure its manifest benefits. For these are that the mind of the legislature may be directly made known to Ministers, not only in set terms and in explicit detail, but also by the activity of that compelling emanation, the 'sense of the House', which men like Peel, Disraeli and Gladstone treated with such respect [3]; and, reciprocally, the Minister may answer in direct debate for his administration. A great deal is to be learned of the intrinsic worth of a man from the direct and continual observation of his personal demeanour, his features, form, and gestures, and the indiscretions of his facial expression. The fact that he has been a member of Parliament for some years, sometimes as many as twenty, has already acquainted him with its manners and modes, and taught him a Parliamentary tact and a respect for his former colleagues which makes for the smooth working of the system. The courtesies he desired and obtained from Ministers as a private member he now gives. This is not to pretend that office does not create a gulf between Ministers and others,—there is a saying in France, that there is a greater difference between a Minister and

[1] This actually happened in the American system, described below.

[2] Cf. Todd, op. cit., I, 242–4. A Bill 'touching free and impartial proceedings in Parliament' was passed by the House of Commons in 1692 in order to disqualify all office-holders under the Crown from a seat in the Lower House. The measure was rejected by the House of Lords. Subsequent Acts included and extended this principle but were too restricted in scope, with the result that Place Bills were introduced in 1694, 1698, 1699, 1704, 1705, 1709, 1710, 1711 and 1713. 'These measures, however, were of too sweeping a character to commend them to the favourable judgement of Parliament, and they were invariably rejected by the House of Commons itself' (Todd, p. 244). The clause of the Act of Settlement of 1700 (12 & 13 Will. III, c. 2, Sect. 3, given below) did not take effect until the accession of the House of Hanover in 1714.

[3] Cf. *Disraeli*, V, 839 ff. Cf. *Gladstone*, Bk. VIII, Chap. I.

eputy than between Deputies of opposed parties—but it is a bridged gulf, with easy and frequent communications.

The mutual accessibility of Ministers and members is the essence of the system. But it has its disadvantages, for it excludes from consideration for office any but members, or potential members, of Parliament. A final judgement of the system, however, obviously depends upon how far the Houses are a reservoir of talent, and how far the Civil Service comes to the aid of the Cabinet with its technical assistance. Nor is the Cabinet, or any Minister, precluded from seeking advice wherever it may be found. A kind of sporadic and unofficial co-option is always going on. The Continent has alternatives, which we shall later examine.

The Large Number of Ministerialists in Parliament. There is another disadvantage, the number of Ministeralists in Parliament is necessarily high, for altogether they number twenty-five, and their Under-Secretaries and Whips add another thirty-five, while one cannot leave out of account the Parliamentary Private Secretaries, another twenty. The number is about 12 per cent. of Parliament's membership, and 25 per cent. of a party of 300. (But somewhat less when the number in the Lords is subtracted.) It is a direct product of the large scope of State activity and the need of each Department for a distribution of Departmental and Parliamentary work. But it causes the immobilization of an appreciable proportion of the House for the task of criticism, and the creation of a fairly solid block as anxious to maintain itself in office, as to make a good use of its power. This is one among other reasons why the special function of criticism is concentrated in the official Opposition. There is always quite a large and interested weight favourable to the suppression of opposition in one's own party, for office is too easily exalted above conscience, though, to the office-holder, it appears that office actually serves conscience. The only way out of this situation is to double the number of members of Parliament, a reform which we have already shown to be desirable on other accounts. Some attempt is made by law to restrict the number of ministerialists sitting in the House of Commons,[1] and the intention of the Act was to reduce executive influence upon it. But its method is antiquated, for it does not allow for the expansion of State activity and the increase of Departments. The proper method is to reduce the proportion by increasing the total membership of the House.

The House of Lords as a Reservoir of Ministers. The peculiar bicameral system of the British Constitution has always dictated that some of the Ministry shall be members of the House of Lords. Until 1867, when the Constitution was a real if not a formal oligarchy, the

[1] By 27 & 28 Vict., c. 34, only five Under-Secretaries can sit in the House of Commons.

Cabinet included peers as of social, if not legal, right.[1] The question was, rather, how many commoners should be included. Since 1867, rapid evolution towards universal franchise, and the rise of the party system, and the development of democratic sentiment, has reversed this policy. The larger number of Ministers are commoners, a very small number, peers; and though we may say that Conservative governments contain more peers, owing to the party's social predilections and the nobility's predilection for that party, other parties have come to regard this element from the strictly utilitarian standpoints, of their talent, their money, their influence, and to arrange regular representation in a House which still has constitutional powers. This is specially true of the Labour Party's connexion with the House of Lords.

Political Unanimity of the Cabinet. The Cabinet is, of course, composed of members of the party or parties commanding a majority in the House of Commons.

We have generalized the usually proclaimed principle that Ministers must belong to the same party, by saying that they must belong to the party or parties commanding a majority in the House of Commons. The principle was proclaimed in the halcyon days when two parties seemed to rule the country, and when everything seemed to suggest that there could never be more than two, even where strife and wild Irishmen abounded. Then, obviously, the principle of responsibility to the legislature meant the selection of the Cabinet from the majority party.[2] There was much less internal cohesion in these parties than later generations supposed, and often so much positive dissension that it was not seldom an impossibility to keep together as a government.[3] But while the simple and happy external reign of two parties persisted, certain obvious governmental advantages resulted, and these were, for the electorate, a choice between two opponents and no more, and this, again, resulted in a fairly simple task of choice, and, for the Cabinet, the possibility of unembarrassed leadership. A closer examination of each of these characteristics is important. We have already treated of parties in a democracy, and especially emphasized

[1] e.g. The Earl of Malmesbury (Foreign Secretary) in the Derby Cabinet of 1852. Cf. *Disraeli*, p. 1161, and p. 1640, confidential letter of Disraeli to Derby, 8 May 1859: '. . . But what is Lord Elgin to be? He must have a post of high administration, and it is difficult to place any other than that of the Foreign Office in the House of Lords. . . .'

[2] Cf. Morley, *Walpole*, p. 157: 'It is true that he (the Prime Minister) is in form chosen by the Crown, but in practice the choice of the Crown is pretty strictly confined to the man who is designated by the acclamation of a party majority. . . . The Prime Minister, once appointed, chooses his own colleagues, and assigns to them their respective offices.'

[3] Cf. *Harcourt*, Vol. II, Chap. XVII: 'War in the Cabinet.' Harcourt, Chancellor of the Exchequer in Rosebery's Cabinet, opposed the foreign policy of the Prime Minister and the 'Foreign Secretary in the House of Lords' . . . (Harcourt to Kimberley, 22 April 1894).

.eir organizing and educating functions: and a first judgement might be, the more parties the better. It is clear, however, that given the present quality of the average elector's education and native sagacity, which are far below mediocrity, the elector is hardly likely to be able to distinguish between more than two points of view on the same question, particularly as this is sure to be exceedingly complicated and explained with evidence which, to a specialist, may seem crude and simple, but which to the common man seems exasperatingly subtle. Consider the criticisms of the Jury-system, where only one issue is before the court! Where there are many parties, they are obliged either to cease to explain in detail, because detail cannot be understood (and this is not good for the elector or for themselves), and rely upon exaggerations of principle uttered catchword-wise, or to proceed with detail and confuse the voters' minds. Despite the doses of detail it cannot be said that the electors have arrived closer to an independent and considered judgement than when only two alternatives faced them. Indeed, the reverse is truer: issues may have been put in terms of faulty generalization, but the competition between two parties brings out their implications; and finally, the House of Commons becomes the workshop of their application to the infinite varieties of the truth.

The influence of party composition upon the Cabinet is even more important to sound governmental judgement than it is to popular control. It is, indeed, an extraordinary proposition, at first sight, that ten or twelve or twenty men can sufficiently agree on every political problem to accept the principle of collective responsibility. Bagehot has said: 'No two people agree in fifteen things; fifteen clever men never get agreed in anything; yet they all defend them, argue for them, are responsible for them'. The answer, however, is Gladstone's answer: 'Rational co-operation in politics would be at an end, if no two men might act together, until they had satisfied themselves that in no possible circumstances could they be divided'; and again: 'What are divisions in a Cabinet? In my opinion, differences of views stated, and if need be argued, and then advisedly surrendered with a view to a common conclusion are not "divisions in a Cabinet". There are, of course, many differences of view; but the question is, can the differences be accommodated? Obviously, the best condition of such accommodation is common allegiance to the same party.' Though men and women often prefer the satisfaction of dispositions which directly benefit themselves more than others, there are loyalties and desires which cause men to subordinate personal pride, acquisitiveness, jealousy, to the policy of a party. But only of *their* party, for it is by their voluntary choice that they are members, and, if it meant nothing to them, they would not follow it. It can be expected, therefore, that where a Cabinet is simply the acknow-

ledged group of leaders of a common party, the best psychological conditions for successful operation exist. The members are not without personal motives, but these are mitigable by reference to their fellowship in a party, and, if not to the merits of its immediate policy, at least to the danger of the conquest of power by the Opposition. On the whole, the best interpretation: full faith and credit, not the worst: self-seeking, is placed upon the action of any member of the Cabinet. Where, however, as on the Continent, several parties enter a coalition, the parties cannot avoid entertaining some suspicion of their colleagues, and since, further, their coalition is certain to come to an end one day, when, instead of being brothers-in-arms, they will be parliamentary and electoral opponents, they cannot avoid being continually on their guard against ruses, and ready with a challenge, nor ready to snatch some advantage for themselves, to the detriment of the general good as interpreted by the whole Cabinet.[1]

This brings us to the vital good in a Cabinet system based upon a single party. Its members may be as frank as they like in the discussion, and they will be heard and met with like frankness, for there is a principle of unity between them reliable, in the last resort, to keep the Cabinet together, and the followers satisfied, even if there are resignations.[2] At least the trial of strength, and the contest of minds, take place in a broad-minded and sympathetic forum. Everything encourages creativeness, for the creator knows that it will not be killed without good cause. If there is an advantage, the party reaps its credit. Where parties enter a coalition such complete frankness is impossible, for it often involves ridicule, the break-up of the Cabinet, or the surrender of hostages to electoral opponents. Hence timidity, equivocation, and crises, and, where strong men meet, continual friction. Even where two hostile wings of an English party have met in a Cabinet, these results occurred, with the addition that the balance of forces was every day shifted, and there was a great deal of secret diplomacy between each meeting of the Cabinet.[3] In

[1] In June, 1930, Baldwin declined MacDonald's proposal of a Three-Party Conference on Unemployment. Cf. *Gleanings and Memoranda*, Aug. 1930, pp. 145, 146, for the correspondence between Baldwin and the Prime Minister. The refusal was based on the objection that 'arrangements with the Dominions and tariffs' would not be considered at the Conference. Cf. 16 July 1930, *Hansard*, Vol. 241, col. 1311.

[2] This, I think, is a perfectly fair generalization from the history of British Cabinets. One goes a long way before common frankness becomes impossible, as between John Morley and Joseph Chamberlain. Cf. *Harcourt*, II, 32 ff.

[3] Cf. *Peel*, *Harcourt*, *Campbell-Bannerman*. Of course coalition under Lloyd George, once the war which united the parties was over, showed all these maladies in a specially acute form, and they were only kept from becoming fatal by the forced exodus of Mr. Fisher, Edwin Montagu and Dr. Addison. Cf. Addison, *Politics from Within*, 1911–18 (2 vols., 1924), Vol. I, Chaps. XVII, XVIII; Vol. II, Chaps. XIII–XVIII.

Let us observe how carefully the leaders of the respective parties in the 'National' Government of August, 1931, limited their co-operation to a specific issue which had baffled them all severally, and the subsequent unsuccessful hunt for a uniting formula.

the interest of creativeness the most desirable basis for a Cabinet is one party, and this is to be weighed heavily against other considerations which would produce government by coalitions.

Nor is this all. It is obvious that in all ordinary circumstances the Cabinet which is based upon a single party is necessarily sure of a majority for its proposals in Parliament. Once an electoral majority is obtained, and the leaders have been almost automatically installed, the rank and file follow them. The severest difficulties and anxieties of the leaders are pre-electoral, not post-electoral, and they may now proceed with all dispatch and vigour, with, on the whole, very little to fear from defection. For the nature of the party system, and of the electorate, may condone and even applaud those who murmur against the leaders, and, generally, this is wholesome; but it will hardly countenance revolt.[1] The terms of a pact in a coalition government, however, can never be stated so precisely as to avoid quarrels about their meaning, nor can all men in each group be for ever sworn to their leaders' bargain; nor, finally, can a coalition government avoid surprises, and when they come there is immediate strain between the leaders, and between these and their respective followers. The majority-party system encourages energy and decision, whether the policy is doing or not doing; the coalition system promotes timidity and vacillation, as we shall show in the section on France and Germany, and has proved the death of democratic government in Italy, Spain, Poland, and Austria. The recent experience of Great Britain shows clearly the great advantage of the Majority-Party Cabinet System by revealing the weakness of a Cabinet founded upon a minority and dependent upon votes uncertain from day to day. The Cabinet stumbles from one embarrassment and humiliation to another, it is unable to carry through legislation without mutilations and postponements, while recasting is disagreeable on account of the defeat of policy, and because, to the electorate, the Government appears weak in intention, though, in fact, it is weak only in numbers and unable to control the time-table of the House. With all the native energy and creativeness in the world, such a government is obliged to fall back on the defensive, and to eat the humble pie it had previously prepared for the Opposition parties. When a Cabinet is split, or composed of a coalition, neither the electorate, nor even the skilled historian possessed of all the archives and memoirs, can discover who was really responsible for a policy. Nor can the electorate ever know truly the proportion of responsibility for resultant policy borne by the Government and an Opposition which marches into different lobbies at each division, not infrequently bifurcating.

The judgement of the body of electors on this situation is sound.

[1] This is true of the Labour Government of 1929 and its dissident groups, and is true of the Conservative Party and its relations with the United Empire Party.

It is adverse to the existence of more than two parties. We need not inquire how far this judgement is self-made, or how far it is the result of tradition and the spread of the views of political leaders and publicists. As no party, however, seems ready to commit suicide for the public welfare, we must reckon with a three-party system and its consequences in terms of Cabinet inefficiency for some years to come.

The Confidence of the House of Commons. The tenure of office by the Cabinet depends upon its control over a majority of the House in matters which it holds to be vital. These must naturally be particular aspects of policy, legislative and administrative, and its general repute and authority. When either of these is successfully challenged by an adverse majority then it is obvious that Ministers cannot go on, that is, if the adverse majority is really intent upon its course. For the machinery of government can be brought to a standstill by refusals to grant supplies and to renew annual legislation like the Army Act. But these sanctions are only the ultimate weapons of an outraged House, not the machinery and conventions which daily move the Cabinet. The undue emphasis which Dicey has placed upon these sanctions ought to be modified, for the convention of dependence upon a majority is so well established and so permanent an ingredient of political mentality, that nothing else is likely to be needed save in revolutionary circumstances. To that point the convention has always operated quite successfully.

If Cabinets were in office more for its sweets than for the development of policy, there might be a danger that they would flout the wishes of the Commons, but, in fact, policy has been a vital concern of Governments, and any serious attack upon this or their general position has caused the resignation of one, or several, or all Ministers. The methods of withdrawing confidence are by outvoting a governmental proposal or attacking a Department, or accepting a Vote of Censure or No Confidence. The latter is, for the whole Cabinet, more deliberate and deadly than the former. For, on the attack upon a special policy, Minister or Cabinet may concede a point which is not vital, or may quibble about the small margin by which it was defeated, or else, where the Opposition is composed of two wings, whether parties or groups of a party, whose co-operation in a majority is casual and not likely to form the basis of an alternative government, there may be occasion for doubt about the sense of the House. But a vote of censure is rather inescapable.[1]

Is there, on the whole, much reality in the power of the House of Commons over a Ministry? The power existed only before the organization of the electorate and modern political parties, when

[1] Cf. Hasbach, *Die parlamentarische Kabinettsregierung* (1919), p. 130.

there was not so complete a dependence upon the electorate. When parties were evenly balanced, or split, and loyalty to a programme and a leader were not the qualifications for candidature and election to the House, there were surprises in the Division Lobby supported by the fairly free groupment of malcontents with the regular Opposition.

Since the rise of strong party organizations the uncertainty has been removed from the House to the inner councils of the party; differences cannot be settled by open secession, for the electoral penalty is apt to be very severe, or the threat of it is; and at the most the dissentients among the followers of the Cabinet can ventilate their grievances in the House in order to frighten the Government off its original and challenged course. Only in abnormal times are the parties likely to be really troubled by parliamentary secessions, when a great crisis occurs in the country and new paths have to be sought; and for the rest the settlement of such disputes is rather a domestic matter of the party, with the very remote possibility of an appeal to the House of Commons. This means that there is little or nothing to be feared by a Cabinet which rests upon a single-party majority for its policy, that Ministers individually, and the Ministry as a unit, are safe. They may make concessions to their own heretics, as of grace, but the House cannot compel them to an involuntary course. Further, Votes of Censure are no more than demonstrations to the public that some part, or the whole of the Opposition, is carefully watching the Government on behalf of the people, and the term has the ring of doom in it, for 'Vote' sounds as though Censure were already resolved and proven. It offers the opportunity on both sides for a full-dress debate: for the Government certainly put all their goods into the window, and both sides attempt the highest number of votes that can be mustered. Every member of the House knows very well that the resolution is simply a pretext for a debate and nothing more. In a system where the government is founded upon a minority of the House the Vote of Censure necessarily takes on a more dangerous character. These things mattered very much when the House of Commons was remote from the constituencies in terms of publicity and a permanent organization linking it to its constituents, but since the almost definite settlement of policy and government at the polls, responsibility and confidence have become electoral, not parliamentary. The system is one of plebiscitary, not representative, responsibility; the House has become the agent and mentor of the public, and rarely takes decisions. Once more we see how responsibility has been taken over by the political parties. At a later stage we discuss the implications of these truths in terms of efficient government.

The Prime Minister and his Colleagues. It is an accepted

generalization that the Prime Minister is *primus inter pares*, that is, first among equals.[1] This rests upon the observed facts in most of the Cabinets since Walpole's time, that one man is called upon by the Crown to form a Cabinet, that he makes the Ministry and distributes offices, presides over Cabinet meetings, and that if he decides to resign for any reason of policy, as distinct from personal incapacity, the Cabinet breaks up.[2] No statute settles the status of the Prime Minister; his salary is drawn as First Lord of the Treasury, an office[3] bound up with the Premiership since 1721, and only since 1906 has a formal position in the table of State precedence been accorded to

[1] Cf. Morley, *Walpole* 1889, Chap. VII: 'The principal features of our system of Cabinet government to-day are four. The first is the doctrine of collective responsibility. . . . The second mark is that the Cabinet is answerable immediately to the majority of the House of Commons, and ultimately to the electors whose will creates that majority. . . . Third, the Cabinet is, except under uncommon, peculiar, and transitory circumstances, selected exclusively from one party. . . . Fourth, the Prime Minister is the keystone of the Cabinet arch. Although in Cabinet all its members stand on an equal footing, speak with equal voice, and on the rare occasions when a division is taken, are counted on the fraternal principle of one man, one vote, yet the head of the Cabinet is *primus inter pares*, and occupies a position which, so long as it lasts, is one of exceptional and peculiar authority. . . .'

Cf. Dicey, *Law of the Constitution* (8th ed., 1915), p. 8. 'The executive of England is in fact placed in the hands of a committee called the Cabinet. If there be any one person in whose single hand the power of the State is placed, that one person is not the King but the chairman of the committee, known as the Prime Minister'; and p. 152: '. . . The Ministry are in truth placed and kept in office by the House. A modern Cabinet would not hold power for a week if censured by a newly elected House of Commons.'

Cf. also Harcourt's comments on Morley's chapter on the Cabinet (Gardiner, op. cit., App. II): '. . . I am not sure that you don't overstate the doctrine of the solidarity of a Government in respect of its Ministers. A Cabinet Minister may be censured and impeached like Lord Melville without necessarily bringing about the destruction of the Government. It depends of course very much on the man and on his particular action which is called in question whether he involves the whole Cabinet or not.

'As to the Prime Minister, I doubt if Mr. Gladstone would agree in the position of autocracy. He certainly is disposed to regard the heads of Departments like Secretaries of State as to a degree autonomous in their own province—regarding the Prime Minister as only *primus inter pares*. I know that he entertains great doubts as to the right of a Prime Minister to require a Cabinet Minister to resign. I know that he tried it in one case for convenience of reconstruction; he was point-blank refused, and acquiesced. [Carlingford.]

'In any event, I think it must be done with the assent and in the name of the Sovereign. This was the case in the dismissal of Thurlow by Pitt and of Palmerston by John Russell. . . .

'Though in theory *primus inter pares* the Prime Minister should really be *inter stellas luna minores*. This was eminently the case with Walpole, Pitt and Peel. . . .'

Cf. also Low, op. cit., p. 158: 'He cannot easily be only *primus inter pares*, and of recent years he has nearly always been something more. He is the really "responsible" minister, the person who answers to the Sovereign and who answers to the nation.'

[2] Cf. *Disraeli*, Vol. VI, Chap. VI, p. 1076. Proposed resignation on Eastern policy. A good example is the resignation of Mr. Macdonald in August, 1931, the preliminary to the formation of a coalition of the three parties.

[3] 'Since the ministry of Sir Robert Walpole (1721–42) the office of First Lord has usually been associated with the position of Prime Minister' (Anson, II, 176).

the office.[1] Indeed, the notion of a Prime Minister was not to the taste of the eighteenth-century Venetian aristocracy, who preferred to divide England locally, into counties, and centrally, into Cabinets of impotent mediocrities; the story of the challenge to Walpole's position is well known.[2] The protest was one founded on personal and factional jealousy, and not upon any impartial consideration of the relationship between the Prime Minister and his colleagues as it concerned the efficiency of government.

It is obvious that one man may stand out in importance above his colleagues in open competition with them in the political arena; it is just as obvious that unless one is given a formally prior status there must be an incessant competition for it *de facto*. But this is not a condition of good government once there is a fairly well-marked difference between rival parties and responsibility to the people is in any degree acknowledged. For such competition is bound to split a Cabinet into real, if veiled, factions, and to put a premium upon the separative forces whenever a difference of opinion arises. A symbol of unity and a practical guarantee of unity are necessary. Some one person must be given a formal predominance which, in itself, will overcome the acerbity or intolerance of private opinions in the Cabinet. To rely upon the personal popularity, and the talent, of the man, would make the office an object of ambition and a source of contention. No form of government has been able to avoid this conclusion. Not all politicians are willing to admit its necessity. But however it is hidden, or counteracted, or denied, it exists. A symbol and instrument of unity in the Cabinet is necessary, something which shall prevent waste of effort, competitive friction, secure regularity in leadership, and avoid indecision; and, to achieve this, in practice, one Minister has been given the Premiership. In England this has come about empirically, and the results are embodied in not very definite conventions. In other countries English experience has furnished the basis for an attempt at written definition.[3] In England the pre-eminence of the Prime Minister is shown and is

[1] The Royal Proclamation of 2 December 1905 gave precedence to 'Our Prime Minister' next after the two Archbishops. Cf. Low, op. cit., p. xx, and Anson, II, 127, 262.

[2] Cf. Morley, *Walpole*, pp. 163, 164, 225 ff., and Sandys' motion to remove Walpole, *Commons Debates*, 1740, XII, 65 ff.: '. . . According to our Constitution, we can have no sole and prime Minister: we ought always to have several prime Ministers or Officers of State: Every such Officer has his own proper Department; and no Officer ought to meddle in the Affairs belonging to the Department of another. But it is publicly known that this Minister, having obtained a Sole Influence over all our public Councils, has not only assumed the Sole Direction of all public Affairs, but has got every Officer of State removed that would not follow his Direction even in the Affairs belonging to his own proper Department . . .' (p. 69).

Both Sandys' attack in the Commons and Carteret's in the Lords were repulsed. Neither Walpole nor his defenders contradicted the constitutional principle maintained by Sandys, but 'only denied the allegations of fact' (Morley, p. 164).

[3] So, most deliberately, in Germany.

secured by (i) the Chairmanship of the Cabinet, (ii) the Leadership of Parliament, (iii) his position as chief channel of communication with the Crown on general policy and (iv) his acknowledged position in the country as leader of the party and the embodiment of the highest political power.

It is, of course, obvious that an incapable Prime Minister may ruin his conventional position. Sometimes, like Peel, Disraeli, or Gladstone, he so far towers above his colleagues that he could dispense with the artificial support of convention without disadvantage to government; sometimes, like Addington, Portland, Goderich and Melbourne, he is so weak that without this authority he would have no power. How can the latter contingency possibly arise? It may arise when death or a sudden political crisis results in the rather sudden re-alignment of parties and colleagues, so that the Prime Minister from a previous dispensation is surrounded by Ministers whose co-operation with him, and among themselves, is untried and incalculable.[1] Nor is political judgement finite, it may always be modified by some new event revealing more clearly, and comparing the character and strength of men.

Even as the Prime Minister makes his Cabinet, so he has the power to unmake it, by resignation or forcing individual resignations. He may even counsel dissolutions.

Against the governmental advantages which issue from the existence of the Prime Ministership there are certain disadvantages. The prestige attaching to the office may on occasion result in an undue demand for deference to the opinion of the man, and a too narrow view of the extent of loyalty to be expected from Ministers, so that independent views and possible creativeness are forbidden. This has occasioned much distress to some Cabinets,[2] and it has deprived the country of the benefits of collective wisdom. The ideal Prime Minister would put into the common stock his own real individual inventiveness and feeling, without forcing the situation by appeal to his formal superiority, and would use his position no more than, in the last resort, to avert an actual split, so that the diverse views on the public good should be fully and maturely weighed against each other and the contingency which they are to meet.[3]

[1] This, I think, is the result of Conservative experience especially since 1922.

[2] E.g. Gladstone and Chamberlain in 1886 (*Gladstone*, II, 543).

[3] This, I think, is true of Disraeli as Prime Minister, though nothing can be more amusing or instructive than Disraeli's perfect handling of his Cabinet with the threat of resignation during the Eastern Crisis of 1877. Cf. *Disraeli*, VI, Chap. VI, 1073 ff.; and for Asquith, see Grey, *Twenty-five Years* (1925), III, 225 ff. Cf. also this estimate of Gladstone: 'He was always profuse in his expressions of respect for the Cabinet. There was a wonderful combination in Mr. Gladstone of imperiousness and of deference. In the Cabinet he would assume that he was nothing. I thought he should have said, "This is my policy. What do you think of it?" and then have fought it out until they had come to an agreement. He always tried to lead them on by unconscious steps to his own conclusions.' Cited, Morley, *Gladstone*, II, 18.

Let us consider the significance of these facts. The Prime Minister is chairman of the Cabinet, unless prevented by illness or other engagements. There was a time when the King presided, but this appears to have stopped because Ministers in the reign of George I made their resolutions privately before the Cabinet meeting, no doubt because at certain points they were collectively hostile to the political pretensions of the Crown, and perhaps because a spiritual gulf came to exist between Englishmen and the alien king still connected with the State of Hanover. It is well known that, in England and Anglo-Saxon countries generally, the Chairman of any Committee attracts a special kind of loyalty, engendered by the vague feeling that business is expedited and improved by order even if the order is not wholly excellent, and that one must be prepared to suffer the Chairman's ruling for the sake of the collective enterprise. There is usually a casting vote inherent in the Chairman; that in itself gives authority. The popular phrase, the Chair, however, indicates quite clearly that it is not to the incumbent, but to an impersonal thing which embodies *rules*, that loyalty is extended. It is clear that the Prime Minister is at an advantage. Secondly, the Prime Minister is leader of Parliament, nowadays, most usually, of the House of Commons.[1] This means that the principal announcements of policy and business are made by the Prime Minister, that questions on non-departmental affairs, and upon critical issues, are addressed to the Prime Minister.[2] He is there recognized as having an immediate authority to correct what he considers to be errors inferrable from any of his colleagues' statements, whether in or out of the House. No Cabinet Minister would consider he had such a right of correction or reprimand concerning any of his colleagues or the Prime Minister, but the Prime Minister exercises such a power, and no one says him nay; on the contrary, the power is considered a right.[3] Generally, the House looks to the Prime Minister as the ultimate oracle in the matters of doubt where Ministers do not give it satisfaction, and as the fountain of policy.[4]

[1] Cf. Todd, op. cit., II, 106. [2] Cf. May, *Parliamentary Practice*, p. 240.

[3] Cf. *Disraeli*, Vol. VI, Chap. IV, pp. 1011–21, for an account of Disraeli's modification of Lord Derby's foreign policy. The Queen supported the Prime Minister. Cf. Letter 7 June 1877: '. . . Only let us be firm and hold strong language to Russia and the rest of Europe will follow. Lord Derby must be *made* to move. The Queen feels terribly anxious about this. . . .'

On 12 January 1928, Viscount Wolmer, Assistant Postmaster-General, declared (in a speech at Aldershot) his belief that 'if the Post Office were managed by private enterprise there would be a more economical and more efficient service'. In reply to a question by Mr. Ammon as to the Government's intentions with regard to the administration of the Post Office, the Prime Minister (Baldwin) said: 'I do not think that my hon. friend made any statement of that kind. I did see what he said. It struck me that when he has attained years of discretion he will speak with that caution which characterizes every one of our utterances.' Cf. also Gladstone's admonition of Robert Lowe, *Gladstone*, Book VI, Chap. X.

[4] Cf. Gladstone, *Gleanings*, I, 241, 242: 'With very little of defined prerogative,

Next, the Prime Minister is the chief channel of communication with the Crown on matters of public concern; but not the only channel, for we have seen too many examples of the Crown's connexion with individual Ministers behind the back of the Prime Minister.[1] What is meant is, that the reports of the Cabinet councils are made by the Prime Minister, and that this account is not revised by his colleagues, and that, in emergencies, the Crown will first consult the Prime Minister.[2]

Most important of all, however, is the position of supremacy which the Prime Minister wins from being chief of his party: since William Pitt's time the interval between a man's entry in Parliament and his accession to the Prime Ministership has only on one occasion been less than thirteen years, and it has more often than not been over twenty-five. No colleague can dispute the significance of this, nor alter the terms of that leadership without either an appeal to the party, or such conspicuous merit that the party itself initiates a reform movement. This would take years of effort against all the latent sentiment of loyalty which has been created and stored to support the Prime Minister, a great complex of feelings and ideas resulting in such inertia that a leader cannot be dislodged: he goes only when he removes himself.[3] The tendency is to support the Leader against his colleagues, unless there is such scandalous ineptitude that it cannot be hidden even from the stupidest of voters; or unless, as we have recently seen, a contingency occurs upon which the Minister remains in office while a large number of his Cabinet secede owing to radical differences of policy. But this point is rarely reached in the modern State. No one knows, and no one cares, where other Ministers dwell, but the fool of fools knows the meaning of 10 Downing Street. Consequently the Prime Minister has tremendous authority

the Leader suggests, and in a great degree fixes, the course of all principal matters of business, supervises and keeps in harmony the action of his colleagues, takes the initiative in matters of ceremonial procedure, and advises the House in every difficulty as it arises. The first of these, which would be of but secondary consequence where the assembly had time enough for all its duties, is of the utmost weight in our overcharged House of Commons, where notwithstanding all its energy and all its diligence, for one thing of consequence that is done, five or ten are despairingly postponed. The overweight, again, of the House of Commons is apt, other things being equal, to bring its Leader inconveniently near in power to a Prime Minister who is a Peer. He can play off the House of Commons against his chief; and instances might be cited, though they are happily most rare, when he has served him very ugly tricks.'

[1] So Harcourt, so Disraeli. On one occasion Queen Victoria even consulted Goschen, in opposition; on another, Disraeli, also in opposition.

[2] Cf. *Gleanings*, I, 243: 'He is bound, in these reports and audiences, not to counterwork the Cabinet; not to divide it; not to undermine the position of any of his colleagues in the Royal favour.'

[3] Gladstone resigned the leadership of the Liberal Party on 16 February 1874. He announced his decision at a Cabinet meeting after it had been agreed that the Government would resign. Cf. Morley, *Gladstone*, Bk. VII, Chap. I. Cf. also Disraeli's call of the Opposition to heel in 1872, Vol. V, Chap. V, p. 513 ff.

over his colleagues: they are, in detail, severally answerable to him, the embodiment of Cabinet unity and supremacy. This it is which makes a Cabinet to be the Prime Minister's Cabinet, and gives him authority which may, if he wishes, undo a majority vote of the Cabinet against him; for, finding himself in a minority, he may threaten resignation which will extinguish the adverse majority by extinguishing the Cabinet.[1] Moreover, the Prime Minister is *ex officio* Chairman of the Committee of Imperial Defence and at Imperial Conferences. It is of interest to note that in the account of the Cabinet given in Gladstone's *Gleanings*, published in September, 1878, the Prime Minister's position as head of the *party* is ignored; the gulf between that time and this is as wide as the great party organizations and the franchise which have grown so extensive since 1880. The Cabinet, so composed, is admirably appropriate to its functions, simply because its functional development has by gradual stages governed the nature of its composition.

Most important of all is the concentration of responsibility in the Cabinet—responsibility for the continuous management of affairs. This responsibility was once towards the Crown; then it became divided between the Crown and Parliament; after 1832 it inclined much more towards Parliament than to the Crown; since 1867, it is to Parliament tempered by daily regard to electoral and party opinion; indeed, the electorate and the parties are organized to exact this regard, so that although the formal public arena of answerability is the House of Commons, the questions and the answers are always moulded with conscious and necessary reference to the constituent bodies outside it.

Now, the existing treatises on the British Constitution insist that the Cabinet is responsible in two senses: that every Minister is responsible individually for the work of his department, and that Ministers are responsible as a body for each Department and for general policy.[2] This convention involves the need of explaining its practical daily operation, and what we are to understand by 'responsibility'. The convention means, in the first place, that certain work is definitely devolved to a known body of men and women, and that thereby each

[1] Thus Peel's power to enact Free Trade and then dissolve Parliament; so also in the break-up of the Labour Government in August, 1931.

[2] Cf. Todd, op. cit., I, 259: 'It is also distinctly understood that, so long as the different members of a Cabinet continue in a ministry, they are jointly and severally responsible for each other's acts, and that any attempt to separate between a particular minister and the rest of his colleagues in such matters would be unconstitutional and unfair.'

Cf. also Hearn, *The Government of England* (2nd ed., 1887), p. 218; Dicey, *Law of the Constitution*, pp. 321, 416.

Anson, op. cit., II (*The Crown*, Pt. I), 108: '. . . Since loss of office and of public esteem are the only penalties which Ministers pay for political failure, we can insist that the action of the Cabinet is the action of each member, and that for the action of each member the Cabinet is responsible as a whole.' Cf. Low, op. cit., pp. 144, 145.

Minister is made responsible for a single Department of State, while being member of a body which collectively acknowledges that it is answerable for all administration and policy. Each Minister becomes the supreme ruler of a Department. He may if he wishes, and if he can, do all the work of that Department. But he finds that he cannot do more than generally direct the chief permanent officials in the few critically important matters of administration, and to elaborate, with their constant co-operation and counsel, policies for his branch of the national life. This is, in our own day, a tremendous task, and can only be accomplished by the aid of the Civil Service, which serves Ministers of any party impartially. The Minister's task is, on the Departmental side, one of stimulus and *direction*; on the Parliamentary and electoral side, advocacy and defence of what he and his colleagues are doing, and, as long as they are in office, they are assumed to be doing all that which is, in fact, being done. From the standpoint of Parliament and the People, the Minister is the Department; behind him stands an office, with an address, enclosing a vast vacuum, and this vacuum is created by the principle of Civil Service Anonymity.[1] The fiction is consciously preserved so that the searchlight of criticism shall travel swift and straight, and not be refracted by passage through the medium of the bureaucracy, about which Parliament and the public cannot learn very much. The Minister is liable for an almost instant answer regarding any of the millions of incidents which may occur in his relations with foreign states, or in all his own counties, towns, districts, parishes, regarding the claims and accidents of the most insignificant individuals, regarding even, let us say, the improper official execution of a diseased cow—he is answerable for all men, animals, things, and natural phenomena, within the purview of his office.[2] He must satisfy the House: and should he not do so, he may be compelled to resign, if the matter is sufficiently grave, having regard to the whole political situation.

What does this last proviso mean? It means that a Minister who is regarded as incompetent by the House may be forced to amend his ways by the fear that his colleagues will consider him individually culpable and too incompetent to warrant their intercession.[3] This

[1] Cf. Chapters on the Civil Service, *infra*, and the debate on Runciman's administration as President of the Board of Education, 22 April 1910, *Hansard*, Vol. XVI, col. 2475 ff.

[2] Ibid., p. 117. Cf. Dawson, *The Civil Service of Canada* (1929).

[3] On 20 June 1895 the House resolved to reduce the salary payable to the Secretary of State for War (Campbell-Bannerman) by £100: the insufficient reserve of cordite for the Army was the pretext on which Campbell-Bannerman (and the whole Cabinet) were defeated. The adverse vote was taken as a general ministerial defeat (cf. *Campbell-Bannerman*, I, 154–8) although the Minister concerned wrote a letter of resignation to the Prime Minister (Lord Rosebery).

Cf. the Coalition Cabinet's disavowal of Montagu in 1922: 'His Majesty's Government are unable to reconcile the publication of the telegram of the Government of India on the sole responsibility of the Secretary of State with the collective responsibility of the Cabinet, or with the duty which all the Governments of the Empire

decision in any case depends upon the situation of the country and the Cabinet's view of the gravity of the offence, and the importance of the man and the deed in the context of their general policy and reputation. On the whole the Chancellor of the Exchequer, and the Foreign Secretary, may be said to be exempt from the fear of individual fall, though not of responsibility, because their offices are such important parts of the general policy of the government, that its joint fall would almost certainly follow upon their defeat.[1]

The Consolidation of Cabinet Business. It is rather difficult to fasten any but the blame for quite small and routine departmental matters upon a single Minister without involving the whole of the Cabinet. Just as local government has become integrated with the work of the central authority, so that to-day there is hardly any real localization of an important subject of government, and just as there is an enormous and ever-growing integration between individual and governmental enterprise, so have all the individual departments of government become integrated. Finance unites them all, the economic and social activities of the State are impossible without a due, and often a consciously interwoven, regard by each Minister for the work of his colleagues. Begin with transport problems and you come to coal, to roads, to the iron and steel industries, to facilities for agricultural freight; begin with unemployment and there is no end to the domestic interests or foreign territories involved. The Minister of Labour sets the ball rolling, and involves the Foreign Office; but this involves the India Office, which has jurisdiction over so many Mohammedans. Or there is a question of cattle imports raised by the Ministry of Agriculture, when the Colonial Office becomes unavoidably implicated. And so on. Only in the minor matters are the departments entirely self-regarding; and these, as a matter of fact, can hardly ever occupy the attention of the Minister.

The Location of Responsibility. Hence, even apart from the political value of the principle of collective responsibility, the actual condition of State activities compels solidarity. The history of

owe to each other in matters of Imperial concern. . . .' Austen Chamberlain, 9 March 1922, *Hansard*, Vol. 151, col. 1490. Montagu's resignation was announced in the same debate (col. 1493). Dr. Addison resigned from the Coalition Government owing to lack of support for the housing policy which he had pursued when Minister of Health. Cf. Letter of resignation, 14 July 1921, *Hansard*, Vol. 144, cols. 1488–91.

[1] Cf. the careful distinction made by Gladstone between Monsell, Ayrton, and Robert Lowe, in the affair of the improper conversion of £800,000 to the uses of the telegraph service. Monsell and Ayrton were compelled to resign; Lowe was transferred from the Exchequer to the Home Office. *Gladstone*, Bk. VI, Chap. XIII. In 1840 Palmerston threatened to resign from the Foreign Office owing to differences in the Cabinet, one section of which was hostile to his policy regarding Turkey. Lord Melbourne entreated him to withhold his resignation which would 'dissolve' the Government. Again, in December, 1851, Russell's dismissal of Palmerston entailed the speedy fall of the Cabinet (in Feb. 1852). Cf. *Palmerston*, I, 370 ff.; II, 211–29.

English government since 1689, however, shows a steady development of the principle of collective responsibility, not as a means to the efficient co-ordination of services, but as a means to locate and intensify the sense of responsibility. The purpose is not merely to secure one body because it is one, and therefore unmistakable, although that is important in the highest degree: it is also to secure that each member of the Cabinet shall be his brother's keeper, especially if he is a particularly weak, or a particularly headstrong, brother. Even if Ministers do not actively invigilate over their colleagues' policy, the theory is that they ought. The knowledge that an individual's error may entail collective damnation is supposed to intensify each Minister's interest in all branches of administration. This principle is effective in English Government, but like all principles it is as effective as circumstances will allow: the more the pressure of Departmental work, the less can Ministers be interested in the activities and speeches of their colleagues, and so it is only on the very highest and critical matters that the principle operates. The presumption, however, exists, and it is advantageous. The disadvantage of the system has been pointed out by Morley, that 'The Chancellor of the Exchequer may be driven from office by a bad dispatch from the Foreign Office, and an excellent Home Secretary may suffer for the blunders of a stupid Minister of War'.[1] This cannot be avoided if the good in the Cabinet system is to be retained: for to enact individual responsibility would be to encourage each Minister to defend himself by pleading his colleagues' culpability, and to be always on his guard rather than open and frank when in counsel. Nor, as we have shown, is it always possible to sever distinctly one branch of public business from another—and the defence would then be, 'Had he not done that, and insisted on the other, I should never have been obliged to do this.' That way lies the downfall of unity of the Cabinet, of frankness in council, and indubitable location of responsibility. We shall see that other manners prevail abroad.

Would it be possible for the government of the country to be conducted by a changing assortment of Ministers regardless of party ties? Yes, if the foreign policy never involved the Exchequer in unwelcome expenditure, if it never raised issues affecting domestic industry, agriculture and commerce, if it never caused a disturbance in imperial relationships; and similarly between the various other departments. Yes; if men were content to manage their own department only and have no other interest either in policy or sympathy with groups of their fellow-citizens. These conditions are normally quite impossible. Hence a certain pre-established harmony of policy is necessary; hence, an agency, party association and collective responsibility, is indispensable.

[1] *Walpole*, p. 155.

Collective Responsibility *v.* Collective Decisions. However, the principle of collective responsibility means only that Ministers answer as one, and in the same sense, for any action in the lifetime of the Government. It does not mean, at least, it has not meant, that there is always or often collective counsel or decisions upon everything, even of importance. So much was admitted by Gladstone.[1] We know, for example, that three or four men of outstanding talents and public importance have ever formed, with the Prime Minister, an informal but definite association, called the 'inner' Cabinet. This is not, and never has been, an institution with recognized public status; it is the spontaneous creation of resourceful kindred souls, as may be proved from any one's experience of committee work. In English history we see this varying body of cognate leaders fashioning the most important policies, deciding on important offices, settling parliamentary or electoral tactics, a very energetic interchange of thought among them constantly proceeding. They shape their policy and get the Cabinet to agree;[2] or see Ministers individually and persuade them to agree when the Cabinet meets; or act without at all consulting the rest of the Cabinet.[3] Yet the whole Cabinet is responsible. Collective responsibility has been interpreted to extend to Ministers' speeches in the country,[4] since these might seem to commit the whole Cabinet.

Then the growth of departmental work and the number of departments makes full discussion impossible. The Minister is too overburdened by his own concerns to be so fully informed or interested

[1] Cf. *Gleanings*, I, 242.

[2] Cf. Low, op. cit., pp. 163–5: 'The first Earl of Malmesbury, during the negotiations for peace with France, wrote a double set of dispatches from Paris and Lille, one set, which contained the really confidential information, being shown only to Pitt, Grenville and Canning. . . .'

Harcourt, II, 270: Gladstone's reply to Harcourt. . . . 'I was made habitually privy in the time of Clarendon and Granville to the ideas as well as the business of the Foreign Ministry, and in consequence the business of that department, if and when introduced to the Cabinet, came before it with a joint support as a general rule.'

[3] Cf. *Campbell-Bannerman*, II, 249 ff., on Grey's negotiations with M. Cambon, the French ambassador, in 1906. 'Ministers were then scattered for the elections, but Sir Edward submitted the draft of this dispatch to the Prime Minister and also to Lord Ripon, the senior Minister available in London . . .' (p. 251). Cf. also Montagu's Speech on India, 1921.

[4] At Dundee on 16 October 1920, Churchill re-affirmed his statement (made at Lochee, 1918) that the Government would introduce some measure of national control over railways (in 1918 he had promised nationalization). The following question was asked in the House (after Bonar Law had announced the Cabinet decision of 7 June 1920): Mr. Hogge: 'Can my right hon. friend say that that means that the Government have repudiated their own pledge on nationalization of railways expressed at the General Election by the Secretary of State for War at Dundee?' 19 July 1920, *Hansard*, Vol. 132, col. 17.

The question of Post Office administration raised by Viscount Wolmer at Aldershot in 1928 has already been cited in a different context (cf. footnote 3, p. 972). Cf. also the efforts of Gladstone to restrain Chamberlain's radical utterances.

in other matters that his judgement is in any sense considered and real. From weighing up the loss of revenue if rebates for local rates are given on playing-fields, the Minister of Health must suddenly turn to constitutional reform in Kenya; from speculating upon Soviet propaganda in the British Empire the Foreign Secretary may be asked to vote on the inclusion of the formula 'genuinely seeking work', in an unemployment insurance bill; while a Chancellor of the Exchequer, overwhelmed with preparations for the Budget, is worried into violently prompt considerations of trade policy with the Dominions or the principles of consumers' control of merchanting. He is apt to continue to think of his own work while his colleagues are discussing matters of joint concern. Further, the size of the Cabinet has increased in proportion as the principal Departments of State have grown in number. Discussions are either conducted with a loss of concentration, or, if some take up more than their arithmetical share of time, the rest contribute nothing but a vote.

These facts, and the necessity to secure mature consideration of policy, have caused the development of the practice of submitting particular branches of policy to Committees of the Cabinet. This practice is almost as old as the system itself,[1] but in recent years it has become more urgent than before, owing to the growth in the amount and complexity of business.[2] As matters arise upon which preliminary study is essential, that is, where a policy has to be elaborated from the first careless inspiration, and where it must be measured by the standards of the scientifically possible, *ad hoc* Committees of three or four members are appointed from the Cabinet, members especially interested or capable being selected; indeed, almost selecting themselves by their acknowledged interest or capacity. These prepare the subject, with the aid of Departmental experts and friendly non-official advisers, and report to the Cabinet, which may do whatever it wishes with the recommendation, but is likely to accept with little amendment, owing to the casual nature of their knowledge of the subject, and the burden of their preoccupations. This development is necessary and beneficial and is bound to go further. Collective counsel is not absolutely necessary to collective responsibility where members of the Cabinet are all of one party, and linked, as they are, to the electorate by the bonds of a party programme.

Unanimity and Secrecy. This brings us back at once to that which we were concerned to labour in a previous page, namely, that the vital principle of collective responsibility, is the homogeneity of

[1] Cf. Todd, op. cit., I, 262.

[2] Cf. ibid., II, 6; Anson, Vol. II, Pt. I, p. 122; *Disraeli*, App. B, p. 392, on the Committee on the Reform Bill (1832), and p. 1588, on the appointment of a similar committee on the reform of the franchise in 1858; *Harcourt*, I, 524, reference to the Cabinet Committee on the Crimes Bill, 1885; Addison, op. cit., Chap. XVIII.

the party upon which the Cabinet is based. The spiritual condition of vigorous, frank, and independent creativeness, which is productive of so much good, is that there should be only a small risk of disruption and self-seeking; and this is provided by the political unanimity of the Cabinet. Another condition, which is made really practicable only by the existence of political unanimity, is the secrecy of the Cabinet proceedings. Cabinet meetings are very private. This characteristic appears to me not to have commenced on any grounds of modern utility; I should think it was rather that, at first, Royal Councils were private, because, in the days of conquest and challenge to the throne, the success of many royal policies depended upon surprise, and strong government was secured by the authority which attaches to mystery rather than by open public consideration, and, later, because the Crown and Parliament were in conflict. Since 1832 the Government of the day has had to secure its inner deliberations from the premature attention of an organized Opposition in Parliament and the country, too well aided by the Press whose eyes and ears are everywhere. Further, since Government is so occupied with the economic and social order, any policy may affect thousands of powerful and wealthy citizens, so that if a secret is divulged before action is taken, it may happen, indeed it has happened, that such citizens have evaded the Government's intentions.[1] Another thing must be remembered: to disclose what happens at the Cabinet is inevitably to disclose differences among its members: to do that is to give the Opposition the opportunity of playing upon those differences, and inevitably to cause a breakdown of united responsibility and to encourage mutual recrimination and individual reticence and distrust among Ministers. Finally, publicity must reduce the independence of mind of Ministers in relation to each other, and by exposing them to the intervention of public opinion, reduce their mature, rational, and independent contribution to the process of policy-making. Inklings of these truths are to be found in the memoirs or speeches of Cabinet Ministers, though none expresses the whole philosophy.[2] We may remark, also, that if secrecy helps to reduce unanimity by preventing the obtrusion of public and disturbing elements into discussion, political unanimity is a very important condition of secrecy. Both help to concentrate responsibility upon a single unit, the Cabinet, and since, also, responsibility is shared by all, and no exact discrimin-

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was asked ...is especially true of Budget disclosures. It has become part of the British 7 June 1920[n] to badger the Chancellor of the Exchequer from October until Budget the Governm[e]y extension of State activity and, especially, Protectionist policy, must expressed at t[h]e anxious attempts to take Ministers by surprise. The events of August, 19 July 1920, *Ri*ght us how sensitive is not only the domestic, but also the international,

The question ...to governmental policies.

shot in 1928 has ...dent of *disclosures of Cabinet proceedings* and the *effect on Foreign* Cf. also the efforts ? Eastern Crisis of 1878.

ation appears between the real and the supposed authors of a policy until long after the event, the more care has to be taken about the inclusion of people in the Cabinet, for no one may be included who is so incapable as to cause its better members to fall.

EFFICIENCY OF THE SYSTEM

We have still to determine the real meaning of 'responsible', but we postpone its consideration until we have indicated the significance of certain subsidiary facts. The Cabinet, constituted and responsible as we have described, is the energetic, driving force in government. In each Department it sets the direction of administration, and a fairly harmonious tendency permeates them all. Economic and political circumstances (analysed in the chapters on Party), and a fortunate instinct for the basic necessities of government, endowed England for a considerable part of the last century with the sufficient semblance, and sometimes with the reality, of a Two Party System. This meant that there was assured to the majority party a stable period of government, which, from the Grey Ministry which began in 1831, to the end of the Baldwin Ministry in 1929, amounted to an average of three and three-quarter years per Ministry.

The effect was, that not only did the whole Ministry have time in which to consider, introduce and pass its legislation, but it also had time to affect considerably the execution of the law, which, up till 1850, was perhaps more important than legislation as a part of modern statecraft. Nor is that all; for if we exclude the transition Ministries, when parties were in an abnormally fluid state—such as the first Peel Ministry (1834–5), the first and second Derby–Disraeli Ministries (1852 and 1858–9), and one or two in the early Home Rule period, we should find the average length of a Cabinet substantially longer than three and three-quarter years. Each Minister can never hope to learn everything about his Department, but he can hope to learn much about his Civil Service advisers, and sometimes impress his personality and politics upon them. This cannot be done in a short time, for the Minister usually knows nothing at all about the office to which he is appointed. There is some good in this, for he is often prepared to overturn bad precedents as well as good. At the end of six months he is just beginning to know his own men and the rudiments of their craft. How can he be effective unless he has time to go further and become capable of independent decision? Though it may be argued that when there is the certain prospect of only a short period of office, the Minister will be the more energetic, we may be sure that such energy will be no more than frantic; and only a long period of office gives men the knowledge, the composure, and the desire to undertake large projects, which will bear fruit in their time. Moreover, it is essential to give every holder of authority in

the modern State ample time for second thoughts—for the issues are so complicated that only personal experience and touch can unravel the wrappings of their novelty and make real their quantitative and correlated weighing. The convention and the practice of the responsiveness of the Civil Service to Ministers is partly the result of their length of time in office.

The Cabinet gradually hammers out its programme of legislation, bringing its general principles into closer relation to the concrete possibilities as disclosed by careful examination of the advice of the administrative experts and scientists, and by the arguments of Parliament: so that the crude clay of desire is fitted into the mould of natural possibility, and the result desired is attained with the minimum of violent collision and coercion. In this process the Cabinet is not in relation with Parliament alone, but with its party and the deputations of citizens who treat with individual Ministers. There is a constant exertion of influence upon the Cabinet by the public through channels other than the formal representative body, and this influence, already large in our own day—so large as badly to frighten those who desire the exclusive location of publicity and regularity in representative bodies—must become larger. There is no good reason why it should not. After so short and special an experience of Parliamentarism we have not yet exhausted the possibilities of governmental invention. It has been found that action through the constituencies, the parties and Parliament, is too slow and technically too irresponsive to meet certain emergencies, while men, in each other's immediate presence, arrive, for good or ill, at understandings which are impossible amidst all the exaggerations and distortions of 'representation'. In these cases it has happened that some members of the Cabinet are deputed to intercede; usually in cases in which the need for the continuity of social services would sooner or later necessarily involve the Government in what seems otherwise a dispute between two non-official groups over an apparently private matter—as in transport, or coal-mining, or the textile industry, or the price of food.

The Cabinet, as we have already shown, has a very effective control over the time of the House, and this enables it to decide the priority of business, and the amount of discussion allowed to each item. This has been possible only when Majority-Party Cabinets have existed. Ministers also guide the Standing Committees even where only details are supposed to be in question. We have also shown how the custom of the constitution and the procedure of Parliament throw upon the Cabinet sole responsibility for the finance of government, with the attendant benefit that ways and means are correlated to expenditure by one mind, and policy and finance are considered in a continuous and living relationship. Then, the Cabinet is the more securely attached to the House by its Whips.

Before the country it is a unit, answerable, energetic, and more than a mere official governing body: it is an ornamental-philanthropic convivial institution, whose attendance at City Banquets, motor-shows, new hospitals, football, cricket and boxing-matches of national, international and Imperial importance, and the opening of sewage works and maternity homes, brings it into brotherly touch and familiar *tutoyage* (in England indicated by the appellation 'old' or followed by the diminutive form of the name) with rich and poor, giving to all the illusion that, after all, there *is* no sovereignty.

The Crown. Between the Cabinet and the Crown there is a continuous and close contact which we examine closer in the next chapter, on Chiefs of State. Here we have only to make some general observations. Ministers are formally His Majesty's Ministers, but convention has made them the people's Ministers, and responsibility which was formerly to the Crown, is responsibility to Parliament and the People. This responsibility is assumed by the Minister by his acceptance of the convention that all the public acts of the Crown need countersignature by a Minister; the countersignature is the sign that responsibility to the Sovereign, whatever the Sovereign may really consist of, is accepted. The person of the Crown is thus almost entirely lifted out of the sphere of political decision. Yet there are certain conventions which still provide the Crown with the possibility of political activity; they are, that the Crown has the right to information about Cabinet decisions and Parliamentary proceedings, that the Crown has the right to communicate with its Ministers, either through the Prime Minister or directly, both of these on the basis that the Crown should have the right to explanation of that to which it is asked to give consent.[1] Once those rights are existent, the way is open for any amount of royal influence which the Cabinet, Parliament and the country are prepared to tolerate. They are not in our own day inclined to tolerate much, but it is more than accepted by those who imagine that the plenitude of governmental power has passed from the hereditary to the elective institutions. Broadly speaking, since the death of Queen Victoria, royal intervention has been used only to advocate the unity of the nation, at times when party and group warfare has threatened to cause violent dissension, and to promote 'national' and Imperial interests in international affairs. All depends upon personality and talent, but as we shall show, the hereditary, symbolic and specially-manufactured social status of the

[1] Cf. *Palmerston*, II, 194, 195. The detailed inspection of foreign dispatches by Queen Victoria and the Prince Consort greatly irritated Palmerston and caused considerable delay; *Harcourt*, II, 234–9: Queen Victoria 'thanks Sir William Harcourt for his regular and full reports of the proceedings in Parliament' (Letter of 26 Feb. 1893); *Campbell-Bannerman*, II, 301. Edward VII, through Lord Knollys, requested that he should be informed regarding the Cabinet's discussions on the Education Bill and the House of Lords (Letter of 23 Nov. 1906).

Crown, enable it to exercise a unifying influence in Cabinet counsel.[1] It is not a power behind the Cabinet, but by and with the Cabinet, and, of course, never against its determined will.

THE NATURE OF RESPONSIBILITY

If responsibility is that which is supposed to keep Cabinets in the path they ought to go, what is the motive and directing force in responsibility? Responsibility means that a position of trust is held, that is, that power can only be used within certain defined limits. The question then, is, who draws those limits, who watches over them, and what is the punishment for their violation? Until 1689 the limits were drawn by the Crown, and the Crown itself was prompted by some reference to the state of opinion in the country and Parliament, and among its friends. No organized and acknowledged institution expressed the limits of royal discretion, for Parliament spoke as a congeries of individuals or groups, neither unmistakably nor in unison, the people were subject, not sovereign, the state of representation was purposely vicious, while there was no question, until matters reached a revolutionary point, of really disciplining a King in the only effective way then known—by civil war.

Since 1689 the device has been found of an irremovable but powerless Crown, and a powerful but removable Ministry. Between the time when the early system was driven to its fall, and the rise of the modern, the device of Impeachment was tried, that is a formal *trial* of the conduct of a Minister before the House of Lords, which might end in exile, imprisonment, fine, or death.[2] This method of imposing political responsibility failed because in its time it was difficult to distinguish the part played by the Crown and that played by Ministers in any specific act of government. Even had it not failed on this account, it would have deserved to fail on another; it was too serious a penalty to use for small errors, and too dreadful to carry out in any case. For to govern is to create, and no creation is without risk of error; and even when a policy is successfully realized, the more successful it is, the less will political opponents like it, and the more jealous and ready to impute sin will they be. To prescribe a grave penalty for failure to satisfy avowed opponents is to paralyse government, while heavily to penalize error is to extinguish experiments the results of which must always be speculative. Supposing impeachment and execution were the consequences of an ill-timed return to the Gold Standard! A mode of settling responsibility was needed not so suspiciously partisan or criminal in aspect; and with it there was required a means of punishment severe enough to discipline, yet not so severe

[1] Cf. Chapter on Chiefs of State, *infra*.

[2] Between 1624 and 1715 there were twelve political impeachments. For history of these cases, cf. Taswell and Langmead, op. cit.

as to kill, leadership. These things were found in collective responsibility on a party basis, and the *loss of office when this had been abused.*

Now there have been times when the House of Commons itself has decided the terms of satisfactory Cabinet leadership. There were years when parties were fairly evenly matched, liable to disintegration, and would transfer their allegiance upon the issues presented to them.[1] This state of affairs ceased to exist in 1896, and even before that, since 1867, did not exist save on matters relating to Ireland. That is, the Cabinet had not to face a possible defection and loss of office as correctives. What then? Of what use, in such circumstances, to say that the Cabinet is responsible to Parliament? The truth is that the responsibility of Cabinets need not be forced, and yet responsibility may be none the less strict, *if the Cabinet positively and voluntarily accept the burden.* That is, the convention *quod populo placuit leges habet vigorem* has grown up, and constitutes part of the definite controlling spiritual forces of English politics. Now this convention might continue and operate beneficially in its vigorous youth, and by virtue of the memory of the disaster which befalls politicians and people when it is disregarded, but men too soon forget the lessons of other people's experience. At the date when the House of Commons ceased to be the headmaster of Cabinets, to reverse the parts, and to come, instead, under the Cabinet's tutelage, the Cabinet learnt to obey a new mentor. If it does not please the people, it loses votes for its party, and this means a loss of its own power and a gain for the Opposition. At least, the Cabinet thinks so; and this belief is the vital principle of the British Constitution. The House of Commons is the forum of debate, and the theatre in which is conducted the comparatively rational dissection of conduct, but the investigation and the defence are not, in the ultimate resort, for the House: the ultimate spectators and judges are the party councils, the multitudinous groups, societies and associations, and the voters.

The Meaning of Office. Is that all? To lose office? Is there nothing stronger in the Constitution to keep Ministers continuously impelled by a sense of responsibility to the people? Can this possibly be effective? Strangely enough, it is. The prospect of losing office is a very strong corrective in British Politics![2] For when Office is lost, prestige evaporates, dignities are transferred, authority and dominion vanish; the man is smaller than the office, and friends

[1] E.g. in the period 1832–67. See esp. *Disraeli*, passim, and *Peel*, passim.

[2] Sidney Low (*Governance of England*, p. 152) erroneously makes light of this: 'Politics, pursued in our modern, gentlemanly, sportsmanlike fashion, carries with it no painful penalty for the politician who loses; he does not play for his head, or his fortune, or even his reputation. The worst punishment Parliament or the electorate inflicts upon the minister who has forfeited its confidence (beyond the loss of a salary which he is often too wealthy to miss), is that of sending him back to his friends, his estates, his sports, his studies and his recreations.'

turn away to new sources of favours, *ubi bene ibi amicus*! The world treats the unlucky and the unsuccessful with ill-disguised contempt. The House no longer hangs upon their lips, and it is not altogether pleasant to lose official emoluments.[1] Although most men sighingly protest that duty alone forces them to suffer the intolerable burdens of office, only those who are in office, or sure of it, make such complaint: the rest are strangely silent. Nor is great energy and dispatch shown to leave office. For though all the motives we have mentioned do operate, there is still one of greater strength, and that is, that those who possess office in England, control a vast range of political opportunity. All that they strive to amend in a faulty state, all that they desire to protect from savage aggression, becomes possible when they are in office, and impossible when they are out. It is a question of who shall, for a stretch of time, be sovereign or subject—you, your class, your idea of your country, or other people and their ideas and interests? Gladstone speaks sound sense on this subject: 'The desire for office is the desire of ardent minds for a larger space and scope within which to serve the country, and for access to the command of that powerful machinery for information and practice, which the public departments supply. He must be a very bad minister indeed, who does not do ten times the good to the country that he would do when out of office, because he has helps and opportunities which multiply twentyfold, as by a system of wheels and pulleys, his power for doing it.' The number of careerists, pure and simple, is rather smaller in British politics than elsewhere, and the number of men and women positively and passionately devoted to their own idea of social amelioration greater. A potent impulse of duty to society, a strong and uncontrollable disposition to 'give the lead' to other people, avidity for power and prestige, the enjoyment of the tumult of business, an itch for fame coupled with the half-conscious memory of revered states-

[1] The following list shows the salaries received by Cabinet Ministers (grouped according to the size of the salary rather than to the importance of the office):

	£
Lord High Chancellor	10,000
Prime Minister and First Lord of the Treasury	5,000
Chancellor of the Exchequer	5,000
Secretaries of State—Home Affairs	5,000
—Foreign Affairs	5,000
—Colonies	5,000
—War	5,000
—India	5,000
President of the Board of Trade	5,000
First Lord of the Admiralty	4,500
Secretaries of State—Air	3,000
—Scotland	2,500
Lord Privy Seal, Minister of Health, President of the Board of Education, Minister of Agriculture and Fisheries, Minister of Labour and First Commissioner of Works (each)	2,000

Cf. also *Report from the Select Committee on Ministers' Remuneration*, 1930, R. 170.

men of the older school, sheer blind loyalty to a party, all play their part in driving men and women into politics and place. Take any or all of these factors, make one or all a strong urge in an individual's life, then threaten to baulk the free action of that passion, and is that not surely a compelling regulator of the statesman's action in politics?[1] Hence office means much; and its loss also; and that is the sanction of responsibility.

Moreover, as we have already shown, there are no formal limits to the sovereignty of Cabinet-cum-Parliament. Cabinet responsibility and the whole electoral process are intimately bound together. This means that the Cabinet has considerable latitude in the freedom to initiate and execute policy. After all, the Cabinet consists of the leaders of the majority in Parliament and among the electors and the managers of the party machine. It will go beyond the possible margin when, like Peel, it emancipates the Catholics or repeals the Corn Laws; or, like Gladstone, springs Home Rule upon its party; or, as in our own day, suddenly pursues a policy of reducing unemployment benefits. But with time and care, persuasion and coaxing, it can exploit to advantage the prestige and status and leadership and the accumulated loyalty of a decade or two, into an initiative independent, at least, of previous pledges to the electorate. Thus Disraeli and Parliamentary Reform, thus the Labour Government and the Electoral Reform Bill of 1931; so, especially in foreign affairs, and in many minor matters. Nor is there any doubt that this is good democracy. So long as Government is *for* the people, and through their elected and recallable representatives, it is proper that they should lead the people as well as follow them.

ACCESSORY FACTORS

The Cabinet system could not work beneficially were it not for certain accessory factors, and these are (1) the neutrality and anonymity of the Civil Service, (2) the organized arrangement of the Cabinet's work by a Secretariat and (3) the aid of special experts in the development of policy. These may be called Technical Factors. There are others which may be called Party Factors: (4) Party control through the caucus, and (5) the continuous existence of a 'shadow' or 'ex'-Cabinet, composed of the leaders of the Opposition.

(1) If the Civil Service were to change with every government, dire confusion would be produced upon every occasion of the assertion of the principle of responsibility. One thing or the other:

[1] Cf. Lucien Wolf, *Life of Lord Ripon* (2 vols., 1921): Throughout that work Ripon complains of ill-health or old age, but assumes office, at a sacrifice, to save the country from the opposition. Cf. Aberdeen (cited *Gladstone*, Bk. VI, X): 'A prime minister is not a free agent. To break up a government, to renounce all the good you hoped to do and leave imperfect all the good you have done, to hand over power to persons whose objects or whose measures you disapprove, even merely to alienate and politically injure your friends, is no slight matter.'

responsibility and neutrality, or a political Civil Service and inefficient, indeed, chaotic administration. We have shown that civilization in the modern state requires above all a continuous and technically capable body of administrators, and we pursue the subject in detail later. Moreover, in order that responsibility may be concentrated upon those who are removable and replaceable without great loss to the country—the Ministers—the service must, in the main, be anonymous; for if it were not so there would be hesitancy and doubt in the apportionment of praise or blame, and though in very truth, there should be such hesitancy and doubt, as instruments of policy and control they are defective. When a Minister knows that he cannot put the blame on his Civil Servants he is stimulated to judge their advice independently and carefully, and to insist that they shall do their best. That he is answerable to Parliament causes him to insist that others shall be answerable to him. Further, the efficiency of representative government depends upon the use of the expert knowledge of the officials; and only the belief that the advice they tender is scientifically impartial and not suspiciously biassed will induce Ministers to rely upon it and come fully under its influence.

(2) There was a time, before 1916, when the Cabinet met at the request of the Prime Minister, without any carefully planned agenda; and of these meetings no minutes were officially taken, though the Prime Minister sent a note of the result to the Crown, and other Ministers scribbled private notes of what occurred. There must have been a need for such a plan of business and a formal record of transactions; and the reasons why they were so late in coming were, I think, first, the convention of secrecy, and secondly, the atmosphere of suspicion and factious hatred in the politics of 1689–1832, partly due to the lasting consequences of the change of dynasty, when the minutes of the previous body of Ministers (one can hardly say Cabinet in a modern sense) might have been used as the basis of parliamentary recrimination and even impeachment. Then, thirdly, when the growth of business might have already pressed for new developments, individual Ministers were probably too busy with their own work to think and demand a better system, leaving it to the Prime Minister and the 'inner' Cabinet to decide the order of business. But now the appeal is openly to the people; no minutes can involve a Cabinet more than their policy has already done; and the way was clear, from 1900 at least, for these formal records. The spirit of 'it-is-not-done' was not, however, overthrown until the War of 1914–18 showed that it was humbug; and since the advent of Lloyd George's War Cabinet in 1916, the Cabinet has a Secretariat, agenda, and minutes.[1] The Secretariat is also in close personal relation with the Committee of Imperial Defence of which the Prime Minister is Chairman.

[1] *Cf. War Cabinet, Report* for 1917 (Cd. 9005), p. 3.

(3) The Cabinet has always been dependent upon the permanent officials for expert advice; but until recent years this has been tendered to individual Ministers by their own Departmental Assistants. This seemed to suffice when the State was not positively ministrant on a large and comprehensive scale. Until the War the higher intelligence was left to the Universities, the Civil Service contributing to, and learning from, University experts. The War, however, had two effects: individual economy was almost entirely replaced by national economy, and the sense of community engendered by the War threw off, first, Reconstruction Proposals, and, next, problems of national economy, like that complex, called Unemployment, and these inevitably imposed tasks upon the State demanding a vastly improved executive machine. Another cause operated in the same direction. The growth in the scale of industry, the connexions between one branch and another observed by the intensification of economic and sociological analysis, the national consequences of a disorganized and overburdened international system of production and credit, could be mastered in no other way than by scientific and concerted forethought. Perhaps, indeed, this and this alone, is England's last hope of leadership in civilization, in a world of passionate and able rivals. Hence deliberate attention has been directed to the provision of a centre of research and advice to serve the Cabinet. The Machinery of Government Committee of 1918 devoted considerable attention to this question, its chief recommendations being, that (1) in the formulation of policy the Cabinet should be more consciously and systematically aided by experts,[1] and that (2) there should be created a separate Department of Intelligence and Research to carry on research into large problems which the individual Ministers are too

[1] *Report of the Machinery of Government Committee*, 1918, Cd. 9230, para. 12: 'Turning next to the formulation of policy, we have come to the conclusion, after surveying what came before us, that in the sphere of civil government the duty of investigation and thought, as preliminary to action, might with great advantage be more definitely recognized. It appears to us that adequate provision has not been made in the past for the organized acquisition of facts and information, and for the systematic application of thought, as preliminary to the settlement of policy and its subsequent administration.'

Para. 14: 'But the principle ought by no means to be limited in its application to military and naval affairs. . . . It will not be possible to apply these methods as fully in the sphere of civil government, because the exact objectives of civil administration are less obvious and less easily defined than those with which the Navy and the Army are confronted; and the elaboration of policy cannot be so readily distinguished from the business of administration. But we urge strongly (*a*) that in all Departments better provision should be made for inquiry, research, and reflection before policy is defined and put into operation; (*b*) that for some purposes the necessary research and inquiry should be carried out or supervised by a Department of Government specially charged with these duties, but working in the closest collaboration with the administrative Departments concerned with its activities; (*c*) that special attention should be paid to the methods of recruiting the personnel to be employed upon such work; and (*d*) that in all Departments the higher officials in charge of administration should have more time to devote to this portion of their duties.'

narrow, too busy with administration, too seemingly biassed, too insular to undertake.[1] So far, the answer to this has been the establishment of the Economic Advisory Council, which we have already described.

Party Accessories. (4) The simultaneous spread of the democratic theory, with the emergence of the leaders of a party above the rank and file of the ordinary member of Parliament, have resulted in more or less systematic attempts of the rank and file to assert themselves against the Cabinet. In the Conservative Party this has shown itself, from time to time, by the formation of 'Die-hard' or 'ginger' groups, and these have attempted to drive the Cabinet along the path of the 'true' Conservative tradition, which seemed to get lost in the necessary compromise and concessions of parliamentary life, and the ever-present consideration that, while a policy is most desirable, it may cause such a loss of votes at the approaching election, that the power to do anything at all will be taken away. The party leaders found no great difficulty in bringing members to heel, for loyalty to leaders is a strong element in the party of Authority. In the Labour Party the matter has been more embarrassing. Upon the assumption of office the usual practice of periodical meetings of the Executive Committee of the Party became impossible, and its place was taken by a 'rank-and-file' Committee. But it is most interesting to observe that its intervention has come practically to nothing, for as the Cabinet is the only body in the State which can really appreciate the pressure of necessity in the business of government, and since urgency is always an over-ruling plea, the Cabinet finds itself able to convince the rank and file that they must give way, and they do. Moreover, the country is normally on the side of the Cabinet, which does, rather than of Parliament, which only talks. Yet it is good that the Cabinet shall be conscious of a lively following, for that is one of the ways by which it is compelled to pay attention to the comparative rightness of its own, its followers', and its constituents', suggestions.

(5) Then, the Opposition has gradually developed an organization to grapple with Cabinet leadership, not so good as the latter, but good for its purpose and for the efficiency of the system. The former Cabinet Ministers form what has variously been termed the 'ex-Cabinet',[2] or more recently the 'Shadow Cabinet'. From time to time it has been disputed whether the leader of the Party, be he a former Prime Minister or a newly chosen person, shall consult *only* former Cabinet Ministers, or shall take counsel with others. Practice naturally varies from leader to leader, but in the Labour Party the matter is decided by the periodical elections of the Parliamentary

[1] *Report of the Machinery of Government Committee*, 1918, Cd. 9230, p. 22 ff.

[2] Harcourt used the term 'late Cabinet' in a letter to Hartington, 25 February 1876, cited in *Harcourt*, I, 300—referring to 'the exclusive pretensions of the gentlemen who call themselves the "late Cabinet" to direct and control the policy of the Opposition. . . .' In the same letter he alludes to 'ex-Cabinet Ministers'.

Executive, though others are not thereby excluded from non-official counsel; and, elsewhere, though the 'inner Cabinet' and other strong members constitute the acknowledged group in the 'shadow Cabinet', the circle is not absolutely exclusive. Mr. Churchill's part voluntary, part obligatory, exclusion from Mr. Baldwin's 'Shadow Cabinet' following differences upon Indian Policy, is an interesting example.

More important is the plain fact that the Opposition feels the need for permanent organization and counsel. Nowhere has the necessity and value been so well recognized as in Bolingbroke's *Spirit of Patriotism*. The doctrine is perfect. There were times when the Opposition was practically without a concerted lead; when it fell to the strongest and ablest to lead as he wished, or be sniped at by the rivals in his own party. Those days have departed for ever, for the public benefit of an organized Opposition has been recognized. The Opposition of one day will be the Government of the next, but the condition is that it shall maintain its identity, and appear always with an alternative programme, which will be regarded by the electorate as a Pledge. The coming elections must be prepared for as carefully as the Government itself prepares for them, and sails trimmed to arrive at the desirable port. Then, the issues in government have become so obviously the apportionment of power, rights and duties among contending social groups that a restraint upon the Cabinet is plainly seen to be more necessary than before, and in order to restrain, it is obligatory to act according to plan, and systematically to match strategy to the opponent's attack. These things impose a 'shadow' Cabinet: something which shall continue the policy of its former and more powerful self, think and create in preparation for a fresh tenure of office, and meanwhile use the authority and strategy of a united body to obstruct, humiliate and bind the Cabinet of the day. It cannot rely, as the Cabinet can rely, upon the aid of the Departments of State, except when this is embodied in published parliamentary papers and the information evoked by parliamentary questions and debate, but it has a substitute in its Party Headquarters Research Department and the occasional help of paid experts. It is in constant touch with its chief campaign managers, the propaganda sections, the constituencies, here stalking Cabinet Ministers and replying to their speeches *seriatim*, and now and then meeting the party in conference. Moreover, the 'shadow Cabinet' arranges debate, entangles the Cabinet, probes it here and there, discredits it, obtains electorally dangerous admissions, treats with the Government Whips for Time and Closure, and when the Cabinet is a Minority Government, forces concessions and imposes amendments. Finally, its rank and file are thus held together, given consistency and direction, and imbued with a united and vigorous spirit. So far has the Opposition become a regular institution that it has been dubbed His Majesty's Opposition, and its leaders, of course,

receive a corresponding recognition—being asked to social functions by Court and People and consulted by the Government when national and Imperial issues require a united front.[1] All this is governmentally good: but even better is the omnipresent compelling, stimulating effect upon the Cabinet: if it is true that this may in the last resort appeal to the people, it is equally true that the appeal cannot but be in part dictated by the Opposition.[2] But England has not yet arrived, as Canada has, at paying the Opposition leader a salary.[3]

WEAKNESS AND DIFFICULTIES

(1) We have already mentioned the unfortunate effects of the large size of the Cabinet upon the ability of each Minister to participate effectively in the formulation of policy. Yet the amount of work to be done by the Cabinet and the tremendous burden upon each Minister, Departmentally, Parliamentarily, Electorally and Socially, have the further effect of foreclosing any thought beyond the immediate tasks. The period of office is a period of practical work, not of reconsideration and creative survey: it is at the same time one of intellectual quiescence and frantic improvisation.

(2) Other burdens now raise difficulties. Participation in world affairs imposes upon several Ministers, the Prime Minister, the Foreign Secretary, the Colonial Secretary and the Chancellor of the Exchequer rather long occasional absences from the country, or from current domestic business.

(3) Some of the spontaneous and valid creativeness of the House of Commons is dissipated by the threat of the Cabinet to dissolve if it is overcome upon a matter it deems vital. Now this point has been over-stressed in a false direction. It has been expressed as though the Cabinet were in the habit of letting the House know that it will definitely dissolve upon such and such provocation, as though members were only coerced by the thought of their election expenses.[4]

[1] As for example at the Round Table Conference on India in 1930.

[2] Cf. the instructive clash between Disraeli and Gladstone in 1873. *Gladstone*, II, 41 ff.

[3] In Canada, since 1905 (Senate and House of Commons (Indemnity) Act, and Amending Act of June, 1920), 'the member occupying the recognized position of the leader of the Opposition in the House of Commons . . . shall be paid an additional sessional allowance not exceeding seven thousand (now ten thousand) dollars.' Cf. Canadian House of Commons Debates, 1905, Vol. V, p. 9729; Sir Wilfrid Laurier: 'The leader of the Opposition under our system is just as much a part of the constitutional system of government as the Prime Minister himself. We acknowledge that it is better for the country, that it is indeed essential for the country that the shades of opinion which are represented on both sides of this House should be placed as far as possible on a footing of equality, and that we should have a strong opposition to voice the views of those who do not think with the majority, and, moreover, that we should have legitimate criticism, not only legitimate criticism, but necessary criticism, which is essential to good government in any land.'

[4] Cf. Lowell, *The Government of England*, Vol. I, Chap. XVII, *The Cabinet's Control of the Commons*.

This is not so. The operation is much more subtle, and sometimes unintentional. It operates thus: when the Cabinet lets it be known that a matter is vital by sending out strong Whips, not only its own recalcitrants are compelled to take thought, but the formal Opposition must seriously consider whether the issue is really big enough for an electoral contest, and whether they are likely to be able to take over the government. If, on the whole, the political position is not quite in their favour they are likely to give way, wholly or in part. In short, each issue is determined not by the objective goodness or badness of the policy, but by whether the Opposition can successfully carry the matter in the country, and this depends on (*a*) the nature of the issue itself, (*b*) the general state of political opinion in the country, and (*c*) the condition of the finances and organization of the party for the coming fray. But these matters hardly arise where the Opposition is in a minority, which in the last two generations has been almost always, or unless the Government party is likely to split, which is a very rare condition. Hence the Opposition cannot do more than obtain that effect upon government policy which (i) its debating talent, (ii) the reasonableness of its argument, and (iii) the calculation of favourable electoral chances, conspire to give.

(4) We have already observed that the Cabinet is a rather large body. It is almost twice the size of the French and German Cabinets. It is too large, it has often been said, for prompt and effective discussion and decision. This is true: one hand knows not the charity performed by the other. In default of Devolution, the only feasible remedy seems to be a regroupment of the Ministries into eight or ten, with each an adequate number of under-secretaries. To a Ministry thus composed there could be added up to four Ministers without Departmental responsibilities.

(5) It is sometimes deplored that the system we have described divides the country into a set of men who strive their utmost to get things done and another set who do their utmost to obstruct them. Thus Shaw and Wells, men for whom I have a religious respect. I understand the urgency of their complaint—they wish the rotten foundations and the ugly and deceiving façades to be swept away *at once*. So do I. But the system springs from the loins of ordinary human beings, and their ultimate demand is the amplest liberty to do as they like and restrain others from doing as *they* like. This wish, when organized, is the democratic theory, and its organized practice is the party system, and Cabinet government its natural flower. Are we so sure of ourselves, and the wisdom and goodness of the intentions of others, that we can surrender the right to obstruct?

(6) The efficiency of the Cabinet as a governing council is limited by the cardinal and decisive condition of its responsibility to Parliament and the electorate. The overthrow of the Cabinet follows soon

upon behaviour which may be appropriate and wise but which cannot be made popular. Hence, necessarily, those who are to guide the administrative departments and decide the vital questions of national and international existence, are not selected by the standards of wise judgment, ability to learn from experts, executive aptitude, and other elements of efficient statesmanship. No! *Popularity* with an electorate, ignorant and divided, is the main, and often the only, qualification. The odds are that not even two or three Ministers in a whole Government will possess creative governmental capacity. Of what use is it, it may be asked, that Ministers are popular, that they prevent the permanent officials from unpopular courses, if they are incapable of *positively* governing? Analysis of the electoral process has shown that, in fact, even a very stupid Minister can, *in ordinary times*, do little harm, since the Civil Service and his more capable friends are prepared to prompt him. But ignorant men, men untrained to intellectual honesty and the practice of veracity, weak fumblers, cannot be helped. As Richelieu recognizes in his *Political Testament* it requires a high degree of wisdom and character to seek and follow advice. The men in a popular Cabinet have arrived only by having caught the votes of a constituency, and, then, having won the confidence of friends who have similarly arrived. This is a precarious basis for governmental leadership in an era of crucial events, for their control requires, at least, fertility of devices, courage, and the ability to seize the significance of the scientific expert's recommendations. Electoral success is hardly a guarantee even of the ability independently to master a printed argument. However, some are necessarily aged and tired upon arrival in office. Hence the frequent and sometimes disastrous deficiency in statesmanship is the price which must be paid for the principle of popularity as the foundation of government. Yet the appointment of non-party experts to head Ministries is not always or necessarily an improvement, for the narrow discipline of his expertness positively prevents him from being a statesman.[1] These considerations apply to all systems where the executive is subject to the elective principle.

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On the whole, with the exceptions here and there noticed, the British Cabinet system offers quick, vigorous, thoughtful and responsible leadership; it is controlled, but not stultified; threatened, but not executed; questioned, but not mistrusted; politically partisan, but not personally malicious; restrained as much by the spirit of responsible power as by its institutions and sanctions; and Janus-like, it looks, at once to the People and to the Senate.

[1] Cf. discussion on pp. 1081 ff. *infra.*

CHAPTER XXIII

THE AMERICAN PRESIDENCY

IT is now time to pass on to a discussion of the Cabinets of other countries, as much to throw into higher relief the features of the British System as to acquire a knowledge of their characteristics. We do not, however, proceed at once to European institutions, but to the Executive in the U.S.A. This—a non-Parliamentary Executive—contrasts so violently with British and European systems—the Cabinet or Parliamentary Executive—that the qualities of both, their merits and demerits as instruments of government, are vividly revealed. So different is the Presidential Executive that it can hardly fit into the present division of chapters; for our intention was to treat of the efficient and the ornamental parts of the Executive separately, but the Presidential System unites them too vitally to admit of separate treatment. Not that it is easy to divide the two in the British or European systems—for what we call ornamental, the King or the President, is in politics efficient for something, though not for those things we have seen to be within the Cabinet's scope, and further, what is efficient is, as we have seen, also socially ornamental. In these systems the functions can be broadly, if not exactly, separated, and different persons are vested with different functions. In the U.S.A. the functions are not separable and they are vested in one person—the President. The President has a Cabinet, but it has no existence in its own right. At a later stage we shall see how far this account must be modified. The discussion is best divided into two parts: What the Fathers of the Constitution intended and made, and what the Presidency has become.

I

THE PRESIDENCY OF THE FATHERS

The Presidency, as made by the Fathers, had these characteristics:

1. It was part of a system in which powers were consciously separated. Yet that separation was not absolute.
2. The Executive power was vested in a President.
3. He received the power to veto legislation, yet not finally.
4. The Presidency was centred in one man.

5. The President was given the right to require the opinions of his Departmental Chiefs.

6. The term of office was limited to periods of four years.

7. A system of election, not parliamentary, yet not plebiscitary, was established.

Let us consider these in a little more detail.

1. To avoid the exercise of arbitrary power, from which Europe and the American Colonies had been long the sufferers, powers were separated. It was intended that the Legislature and the Executive should be masters of their own special function and able to resist encroachment. Yet it was seen that they ought also to march together, even if only to complete the check upon each other [1]: hence the Senate was made the associate of the President in the ratification of treaties, only Congress was to declare war, and the Senate was to co-operate with the President in certain high appointments. Further, the President was obliged ('he shall') to inform Congress of the state of the Union, and recommend to their consideration 'such measures as he shall judge necessary and expedient'.[2]

2. The Constitution says of the President: 'That the Executive Power shall be vested in a President of the United States of America'[3]; that before entering office he swear or affirm 'to execute his office faithfully, and preserve, protect and defend the Constitution', to the best of his ability[4]; that 'he shall take care that the laws be faithfully executed', and 'shall commission all the officers of the U.S.A.'; that he shall be 'Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States'. And, finally (for our purposes), the President

'shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but

[1] Cf. Chapter VI, *supra*.

[2] Art. II, Sect. 3, and cf. Farrand, III, 895. This power was added in committee and came out first in Pinckney's plan. This was based on the belief, not widespread nor uttered in the committee, that the executive would have a knowledge of the needs of government so intimate that he would be able to afford valuable aid to the legislature. Such a clause had worked beneficially in the constitution of New York (Thach, *Creation of the Presidency* (1922), p. 36 ff.). In the constitutional controversies of 1778 in Massachusetts which had suffered badly from a weak executive and an interfering legislature, the Report of the Town of Essex, drafted by Theophilus Parsons, future Chief Justice of the State, contained doctrine which was to be influential upon the Convention. 'As the Governor will have it in his charge to state the situation of the government to the legislative body at the opening of every session, as far as his information will qualify him, therefore he will know officially all that has been done, with what design the laws were enacted, how far they have answered their purposed end, and what still remains to compleat the intention of the legislative body' (T. Parsons, *Memoir of Theophilus Parsons*, App. I).

[3] Art. II, Sect. 1 (1).

[4] Ibid., Sect. 1 (8).

the Congress may by law vest the appointments of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments '.

The terms of the grant of power are so concise as to be obscure, and it is obvious that they could mean little until they were given meaning by the various incumbents of the office acting at different times and in different circumstances. One thing would have seemed clear to a reader of the constitution in the early days, that the President was excluded, except for simple recommendation of measures, from the legislative function, for the constitution says with marked emphasis not that the legislative power shall be vested in Congress, in the phraseology which grants executive power to the President, but ' *all* legislative *powers* ' are vested in Congress.[1] Did then the Fathers intend the President to be a mere executive tool, carrying out the specific duties put upon him by the constitution and the laws made by Congress, or did they intend that he should exercise a general leadership similar to that of Ministers in Great Britain? Was he to be led and commanded by the laws, or to be a spontaneous creative factor moving in the orbit of his own discretion until he came upon positive legal and institutional obstacles? The Convention did not quite know what it wanted; some members spoke as though they considered and desired an Executive with powers like George III's or Louis XVI's,[2] but differently elected and controlled, while most looked upon such views with fear and disfavour, regarding the Presidency as an agent without power of independent leadership.[3] The fact was that the Convention could not deny that since 1776 the country had seriously suffered from the weakness of the Executive and the omnipotence of the Legislature. In the States there were turbulent and ignorant assemblies, which, save in New York, contrived to make the executives their abject creatures. In the Confederal system there had been no executive, save occasional committees of Congress; and these had given way to more permanent and independent institutions only for short periods when the stress of warlike circumstances forced Congress into the incipient stages of efficiency.[4] Even Jefferson, doctrinaire democrat as he was, grew sick of the clumsy behaviour of Congress.[5]

[1] Art. I, Sect. 1.

[2] Farrand, *Records*, I, 113; II, 52.

[3] Cf. Farrand, I, 70, 101, 65. The last reference is to Roger Sherman's view: 'The Executive magistracy . . . nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only, which was the depository of the supreme will of the Society.' See also James Wilson, ibid.

[4] Cf. Learned, *The President's Cabinet* (1912), Chap. II.

[5] Cf. Jefferson to Carrington, 4 Aug. 1787; *Writings* (Ford ed.), IV, 424 (cited by Thach, op. cit., p. 71): 'I think it very material to separate in the hands of Congress the Executive and Legislative powers, as the judiciary already are in some degree. This I hope will be done. The want of it has been the source of more evil

We shall never know whether the vesting Clause: 'the Executive power is vested . . .' was meant by its author [1] to give a grant of all powers not granted already to the legislature and later to the judiciary. The largest casuistical opportunities were given when the Executive vesting clause was made so general, yet where the legislative grant ran: 'All legislative powers *herein granted*.' Thus Congress seemed limited to an enumeration: the Executive not. Yet throughout the debates one discerns the inkling that here was a power which ought at least to be vigorous and capable of its tasks, and which would perhaps become of very great, if not of prime, importance. Hence the very lengthy controversies about tenure of office, the mode of election, unity or plurality, and the appointing power. If the Executive was deemed to be a mere passive tool, why were these elements of office so strenuously debated? They were debated to secure the proper vigour of the Executive, and at the same time to cause it to be subject to a rather strict interpretation of executive duties, and this was not only with an eye to Montesquieu.

I am inclined to say that Montesquieu's influence was less than is generally supposed—what mattered was the real efficiency of government; native experience had shown that the legislature was prepared to destroy the Executive. On the whole, I think, the Fathers desired a vigorous but a positively limited Executive. Nor did the '*Federalist*' make greater claims. Yet the differences of temper within the Convention, like that between Wilson on the one side, and Sherman on the other, have persisted, and Presidents have, indeed, viewed their office as a positively limited agency, or as creative leadership, according to their personal character and the tasks confronting them. All obviously depends upon this: and the only thing in which the members of the Convention were right was when they prognosticated, in all its diverse possibilities, the influence of different motives in the employment of the several powers of the President. Already in 1793, when Congress attacked Washington for his proclamation of neutrality, Hamilton [2] produced the argument which was to become so practically potent in the hands of men like Roosevelt and Wilson t

'The second article of the Constitution . . . section first, establishes this general proposition, that the executive power shall be vested in a President of

than we have experienced from any other cause. Nothing is so embarrassing as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over the files of Congress, he will observe the most important propositions hanging over from week to week and month to month, till the occasion have past them and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small objects; and should this division of power not be recommended by the Convention, it is my opinion Congress should make it itself by establishing an executive committee.'

[1] Gouverneur Morris in the Committee of Style. [2] *Pacificus* letters.

the United States of America. The same article in a succeeding section, proceeds to delineate particular cases of executive power . . . it would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations, as in regard to the co-operation of the Senate, in the appointment of officers and the making of treaties which are plainly qualifications of the general executive powers (*sic*) of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms antecedently used. . . . The enumeration ought therefore to be considered as intended to specify the principal articles implied in the definition of executive power, leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the constitution and with the principle of free government. The general doctrine of our constitution then is that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications which are expressed in the instrument.'

Yet compare Hamilton's exposition of the subject in the *Federalist*![1] Ten essays are devoted to it, and all of them deal either with generalities or with the enumerated powers: only one paragraph considers the Presidential power outside these limits, that again is a simple enumeration of things not already discussed.[2] More, the issue arose in the First Congress under the Constitution, for the Constitution had expressly dealt with the appointing power, but not with that of removal, and the power of removal raised vital questions of executive authority. In that Congress, no fewer than one-third of the members of the Convention found leading places. The principal solutions offered were: that the power to remove followed the power to appoint, that is, it belonged to President and Senate; that Congress ought to vest removal in the President, it having the absolute power to do this, since it had the absolute power to create offices; and, finally, that the power was solely the President's by virtue of the constitution. Representatives who favoured a weak President, like Gerry and Sherman, supported the first proposition on the grounds that no clause gave the power to the President in express terms, and because it would be 'a mingling of the executive and legislative powers'.[3]

[1] LXVII–LXXVII.

[2] Cf. LXXVII (Everyman ed., p. 393): 'The only remaining powers of the Executive are comprehended in giving information to Congress of the state of the Union; in recommending to their consideration such measures as he shall judge expedient, in convening them or either branch, upon extraordinary occasions, in adjourning them when they cannot themselves agree upon the time of adjournment; in receiving ambassadors and other public ministers, in faithfully executing the laws; and in commissioning all the officers of the United States.

'Except some cavils about the power of convening *either* house of the legislature, and that of receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any. It required, indeed, an insatiable avidity for censure to invent exceptions to the parts which have been excepted to.'

[3] *Annals*, 1, 395, 396.

Madison supported Presidential power on the plea that only thus could responsibility in administration be secured—'the claim of dependence be preserved', and 'terminate in the supreme body, namely in the people, who will possess besides, in the aid of their original power, the decisive engine of impeachment'.[1] This was not the only voice which expressed the view that the President needed powers commensurate with wide and responsible executive authority.[2] The controversy revolved around two questions of expediency: could there be executive control without the power to remove, and ought the Senate to be excluded from administrative activity? Unless the latter were secured it was feared that the Senate, then a body of twenty-six members, might become an executive council, more or less permanently in session, to control the Executive. But, in the controversy, there also emerged the difference between those who sought power of removal as implied in the constitutional power of the President, and others. The former argued that the power of removal was *by nature* executive, and that the executive power was vested in the President; whereas the Senate was a legislative body.[3] To this view Madison, who was originally for Presidential power, but only as an outcome of a grant by Congress, finally rallied.[4] 'The consti-

[1] *Annals*, I, 518.

[2] Ames, ibid., I, 492–3 (cited in Thach, p. 147): 'The constitution places all executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others. When the objects are widely stretched, or greatly diversified, meandering through such an extent of territory as that the United States possess, a minister cannot see with his own eyes every transaction, or feel with his hands the minutiæ that pass through his department. He must therefore have assistants. But in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment to cease.

'The executive powers are delegated to the President, with a view to have a responsible officer to superintend, control, inspect, and check the officers necessarily employed in administering the laws. The only bond between him and those he employs, is the confidence he has in their integrity and talents; when that confidence ceases, the principal ought to have power to remove those whom he can no longer trust with safety.'

[3] Cf. the notes of Ellsworth's speeches, taken by John Adams, *Works*, III, 409 (cited by Thach, p. 155): 'There is an explicit grant to the President which contains the power of removal. The executive power is granted; not the executive powers hereinafter enumerated and explained. The President, not the Senate, appoint; they only consent and advise. The Senate is not an executive council: has no executive power. The grant to the President express not by implication. The powers of this Constitution are all vested; parted from the people, from the States, and vested not in Congress, but in the President. The word sovereignty is introduced without determinate ideas.'

[4] *Annals*, I, 396–7 (cited by Thach, p. 152): '. . . The constitution affirms that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The constitution says, that in appointing to office the Senate shall be associated with the President, unless in the case of inferior officers, where the law shall otherwise direct. Have we a right to extend this exception? I believe not. If the constitution has invested all executive power in the President,

tution affirms that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. (Senatorial co-operation in appointments.) Have we a right to extend this exception? I believe not.' And this was the view which then prevailed, though we shall see that it suffered curious vicissitudes in the ensuing century-and-a-half. The other doctrines were put on the same occasion by Jefferson and Madison.

Thus the founders were certainly not unanimous in what they wanted: but the weight of opinion was in favour of a vigorous but limited executive: for Hamilton and men like him were exceptions in the early days of the Republic. But others, later, were to be able to exercise what Hamilton could only proclaim. They were the better enabled to accomplish this, because, as the Fathers of the Constitution variously foresaw, each specific power could be used in a spirit and with an intention different from those which determined its creation. The Fathers, however, could not help themselves: try as they would, they could not produce institutions which should absolutely foreclose the possibility of personal enterprise in new directions in the future. Thus, as we shall see in detail, executive powers were gradually used not only for their directly appointed ends, but to secure a general authority for political leadership.[1] Among these powers that of appointment and the inferred power of *removal* have been of peculiar efficiency in the expansion of Presidential authority.

3. The veto power is but one of the President's functions, and it

I venture to assert that the Legislature has no right to diminish or modify his executive authority.

'The question now resolves itself into this, Is the power of displacing an executive power? *I conceive that if any power whatsoever is in its nature executive, it is* the power of appointing, overseeing, and controlling those who execute the laws. If the constitution had not qualified the power of the President in appointing to office, by associating the Senate with him in that business, would it not be clear that he would have the right, by virtue of his executive power, to make such appointment? Should we be authorized, in defiance of that clause in the constitution,—"The executive power shall be vested in a President",—to unite the Senate with the President in the appointment to office? I conceive not. If it is admitted that we should not be authorized to do this, I think it may be disputed whether we have a right to associate them in removing persons from office, the one power being as much of an executive nature as the other.' *In the opinions in Myers v. U.S.A.* (1926) the history of the question and controversies is very brilliantly retold.

[1] Cf. Munro, *The Government of the United States* (rev. ed., 1925), p. 138: 'But the President has no inherent authority, no "prerogatives" such as are possessed by the Crown in England. All his powers are derived from the constitution, the laws, the judicial decisions, or, in a few cases, from usage. President Roosevelt once asserted the novel doctrine that it was his right "to do anything that the needs of the nation demand unless such action is forbidden by the constitution or the laws". This was a characteristically Rooseveltian point of view, but it is absolutely at variance with the whole system of American governmental authority. The President's powers are those which have been given to him, not those which he chooses to assume.'

This begs the question. The real point is what are the powers which have been given to the President? Do they not also include those which he chooses to assume? The answer clearly depends upon our general theories of government; for they will control our interpretation of the Constitution.

has been turned to serve purposes beyond those for which it was established. The provisions of the Constitution on this point are [1]: that before a Bill, having duly passed through Congress, becomes law, it shall be presented for the approval of the President. If he does not approve, he shall return it to the House in which it originated, with his objections. Both Houses may then repass the Bill with a two-thirds majority, when the President's veto is overridden. (Similarly with orders, resolutions, or votes where the concurrence of both Houses are necessary.)[2] That is to say, the President has a qualified, not an absolute veto. He may challenge the Congress without stultifying it, if it is sufficiently intent upon its course. Further, the President need not positively approve of a Bill by signing it, nor return a Bill with objections: if a Bill is not returned by him within ten days, the same shall be a law in like manner as if he had signed it. If Congress adjourns or expires within that ten days he may veto the bill by merely 'pocketing' it.

What was the intention of this device? English and Colonial experience of the veto power had made it most distasteful to Americans. Their State Constitutions, with hardly a single exception, abolished it. But by the time the Convention had met, opinion had swung round: there was now a deliberate intention – indeed, the royal veto of Great Britain was now cited favourably—to add vigour to the Executive, and provide it with the weapon of defence against the Legislature.[3] In this part of the Convention's proceedings Hamilton took a leading part, and his argument here and later in the *Federalist* was, that a defence must be created against the 'natural' tendency of legislative bodies 'to swallow up the Executive'.[4] Indeed, Hamilton and some others

[1] Art. I, Sect. 7, paras. 2 and 3

[2] Cf. Story, *Commentaries on the Constitution*, Sect. 892, and Willoughby, *The Constitutional Law of the United States*, Vol. II, Sect. 367

[3] Cf. Mason, *The Veto Power* (1891), Chap. I, pp. 18-23.

[4] Farrand, I, 107. The motion was put by Wilson and seconded by Hamilton Cf. also Hamilton, *Federalist*, LXXIII, 374: 'The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defence.'

Cf. Madison (Farrand, II, 35): 'Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent. If no effective

were the protagonists not of a qualified but of a complete negative. Some were afraid that such a power would be used as a means of extorting money for the passage of bills (thus Franklin); others that it would be so great as to be too difficult to use (thus Madison); some were against it altogether on the ground that the two Houses were sufficient checks upon each other; others because 'we ought not to believe that one man can possess more wisdom than both branches of the legislature'.[1] The Convention came round to a qualified veto for the reasons of defence against encroachment, and *because they believed that the legislature would profit by executive wisdom.*[2] Further, it was seen by at least one member of the Convention that the powers might seldom be used, yet be effective. 'The legislature would know that such a power existed, and would refrain from such laws, as it would be sure to defeat. Its silent operation would therefore preserve harmony and prevent mischief.' It is clear to me from these and other contributions to debate that the Convention intended the veto power to be a legislative as well as an executive factor.[3] One other point deserves notice. The veto power applied to the whole Bill. It might be a more useful instrument if it could be made to apply to parts of a Bill. To this we revert later.

Unity and Responsibility. 4. The Presidency was centred in one man. The theories concerning this arrangement are most instructive, especially when we bear in mind the causes of the growth and maintenance of the conventions of the British Cabinet system. Of those who contended for a unity in the executive some argued that the states already practised it.[4] Others said that a plurality would result in an intestine struggle for the profit of the particular localities

check be devised for restraining the instability and encroachment of the latter, a revolution of some kind or the other would be inevitable. The preservation of Republican Government therefore required some expedient for the purpose, but required evidently that in devising it the genuine principles of that form should be kept in view.'

[1] Farrand, I, 101.

[2] Ibid, p. 99: 'Mr Sherman was against enabling any one man to stop the will of the whole. No one man could be found so far above all the rest in wisdom. He thought we ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinion of the Legislature.'

Cf Hamilton, *Federalist*, LXXIII, 374, 375: 'But the power in question has a further use. It not only serves as a shield to the Executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.'

[3] There were some who wished to place the veto power in the President and the Supreme Court (Madison principally), but the Convention rejected the proposal, *thinking that judges ought not to be parties to laws which they might later have* to revise and that the judiciary should be aloof from politics.

[4] The *experience of New York on this matter was decisive. In other states* the plurality of the executive had had such bad results as to press the Convention towards executive unity.

from which the members came.[1] The evils of 'delays, divisions, and dissensions' in a plurality were often elaborated, and it was observed that a unity inevitably produced tranquillity.

'Among three equal members', said Wilson, 'he foresaw nothing but uncontroulled, continued, and violent animosities; which would not only interrupt the public administration; but diffuse their poison thro' the other branches of government, thro' the states, and at length thro' the People at large. If the members were to be unequal in power the principle of the Opposition to the Unity was given up.' [2]

But it was also argued that responsibility would be most keenly felt by one [3]; that energy, dispatch, and secrecy were the immediate properties of a unitary executive. I do not think that there can be any doubt that the experience of the Confederation which had no single Executive, and even more, the fact that America was hardly yet out of a state of war, in which energy, dispatch and secrecy are essential to success, coloured these opinions. Moreover, the vast area to be governed by a central body made the problem seem insoluble to some unless there were vigour at the centre.

I find no more careful psychological analysis of the conception of *responsibility* in the Convention than that which appears in James Wilson's remarks:

'In order to control the Legislative Authority, you must divide it. In order to control the Executive, you must unite it—One man will be more responsible than three. Three will contend among themselves till one becomes the master of his colleagues.' [4]

Similarly in the debate in the North Carolina State Convention, and the *Federalist*. In the former, Davie, the North Carolina delegate, said:

'With respect to the unity of the executive, the superior energy and secrecy wherewith one person can act, was one of the principles on which the convention went. But a more predominant principle was, the more obvious responsibility of one person. It was observed that, if there were a plurality of persons, and a crime could be committed, when their conduct came to be examined, it would be impossible to fix the fact on any one of them, but that the public were never at a loss when there was but one man.' [5]

Hamilton's analysis is even closer. He requires in a Republic an Executive both energetic and safe. Energy, he discovers, is promoted by *unity, duration, adequate provision for its support, and competent powers*. Safety is a *product of dependence on the people and responsibility*. We here consider only unity and responsibility. It is not difficult to prove that energy—that is, prompt and decisive action—is more likely to be a product of one than of many, if we exclude the kind of oneness produced in the development of the

[1] Farrand, I, 89. [2] Ibid., I, 96. [3] Ibid., I, 65. [4] Ibid., I, 254.
[5] 18 March and 28 July 1788. Cf. ibid., III, 347.

British Cabinet system, which in Hamilton's time was but stumbling towards consciousness. In a plurality the dangers are, according to Hamilton, 'differences of opinion', and 'personal emulation and even animosity'.[1] We have already observed how these are restrained only by the establishment of Cabinets issuing from a single political party. Hamilton points out how, not only may these discussions mar executive actions, but they might even split the country into 'irreconcilable factions adhering differently to the different individuals who composed the magistracy'.

Then Hamilton proceeds to the point which is of exceptional interest in a world of governments responsible to uneducated and unvigilant electorates, and I quote his remarks at length:

'But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan,[2] is that it tends to conceal facts and destroy responsibility. Responsibility is of two kinds—to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted than in such a manner as to make him obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune, are sometimes so complicated that, where there are a number of actors which may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable. . . .[3] And who is there that will either take the trouble or incur the odium of a strict scrutiny into the secret springs of the transaction?'[4]

[1] Cf. *Federalist*, LXX, 360: 'Men often oppose a thing merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honour, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking, with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice, in the human character.'

[2] Several magistrates of equal dignity and authority; or an ostensible Executive with a council.

[3] In England at this time and for decades afterwards members of the Cabinet could be heard rejecting responsibility for various decisions with which they did not happen to be in personal agreement. Yet they remained in the Cabinet.

[4] The direction of thought before the convention met was swiftly away from legislative handling of executive business, towards the smallest possible council. 'Such is the temper of mankind, that each man will be liable to introduce his own

The arguments for Unity prevailed as they have everywhere prevailed. But in other countries the method adopted has been vitally different from that in the U.S.A. There Unity was secured by the vesting of power in a single person; in England, but less efficiently elsewhere, Unity was sought, and in time secured, by the bond of party. In all systems, if responsibility is required, plurality must be reduced. What came of this aspect of the Presidency, and the meaning of responsibility in the American system, are yet to be discussed.

The arguments of those who supported a plural Executive, lead on to the reasons for the establishment of the President's Cabinet. Most were afraid of the appearance of monarchy on American soil—a single magistrate was 'the fœtus of a monarchy'. A trinity, which was most frequently suggested, would give the same vigour as one, yet reduce the possibilities of despotism. More, a council, as in other countries (and the nascent Cabinet in Great Britain was always, and not unfavourably, present to the thoughts of the delegates), would have weight with the Chief, and attract the confidence of the people.[1] A council would be more in keeping with republican manners; moreover, men of equally high merit would not be excluded from office as when there is but one magistrate. To the objection that in a council responsibility is hard to fix, it was answered that impeachment might remove any single culprit. Here, indeed, was the difficulty faced by the British Parliament in the early days of the Cabinet system. It was argued that a council would be 'the organ of information of the persons proper for offices—their opinions may be recorded—they may be called to account for their opinions and impeached—if so, their responsibility will be certain, and in the case of misconduct their punishment certain'.[2] The greater the power of the Executive, the less ought *one* to receive the trust. The greater the number, the more concern would there be for diverse interests in such a large

friends and connexions into office, without regarding the public interest. If one man or a small number appoint, their connexions will probably be introduced. If a large number appoint, all their connexions will receive the same favour. The smaller the number appointing, the more contracted their connexions, and for that reason, there will be a greater probability of better officers, as the connexions of one man or a very small number can fill but a very few of the offices. When a small number of men have the appointment, or the management in any particular department, their conduct is accurately noticed. On any miscarriage or imprudence the public resentment lies with weight. All the eyes of the people are converted to a point, and produce that attention to their censure, and the fear of misbehaviour which are the greatest security the State can have, of the wisdom and prudence of its servants. This observation will strike us when we recollect that many a man will zealously promote an affair in a public assembly, of which he is but one of a larger number, yet, at the same time, he would blush to be thought the sole author of it. For all these reasons, the supreme executive power should be rested in the hands of a small number, who should have the appointment of all subordinate executive officers' (T. Parsons, *Memoir of Theophilus Parsons*, p. 381).

[1] Farrand, I, 66, 97.

[2] Ibid., I, 70, 71.

territory.[1] An executive of one is contrary to the republican genius, while a plurality offers a proper republican check upon ambition.

5. We shall see that a way has been found, at the least, to satisfy the claims of geographical representation. The President was given the power to 'require the opinion, in writing, of the principal officer in each of the Executive departments upon any subjects relating to the duties of their respective offices'.[2] This was the uttermost concession made by the Single-magistrate School to the idea of an executive council. All thought it wise formally to permit the President to confer with the high executive officers, and there seems to have been a general feeling that these officers as a Council should have the right to advise and record their proceedings, but not to control his authority.[3] This suggestion has been realized almost to the word by development. But it will be seen from the text of the constitution that the initiative 'to require the opinion' is with the President. Apparently the intention was to get the benefit of counsel and advice without obscuring responsibility.[4] It is difficult to discover whether the phrase 'in writing' was intended to make responsibility for advice the clearer by its recording, or whether it was inserted to fend off the institution of a council which should meet the President *in persona*.[5] The evolution of a collegiate body of advisers to the President was the result of necessity and practice—but it is an institution vitally different from the Cabinets of Europe.

6. The powers of the President constituted a question vitally intertwined with that of the period of office and the mode of appointment. The constitution says that the President 'shall hold his office during the term of four years'. There are no express terms relating to re-eligibility: but practice and convention have admitted the desirability and propriety of two terms, but not of three: How was the term of four years fixed upon? Again, it was the rescue, by those who desired a strong executive from those who were afraid of it, of the principle of re-eligibility. Originally, a term of seven years without ebgibility for subsequent terms, was suggested, and despite a steady

[1] Farrand, I, 113. Mason: 'If the executive is vested in three persons, one chosen from the northern, one from the middle and one from the southern states, will it not contribute to quiet the minds of the people and convince them that there will be proper attention paid to their respective concerns? Will not three men so chosen bring with them, into office, a more perfect and extensive knowledge of the real instincts of this great Union?' Cf. also McHenry, *ibid.*, II, 543.

[2] Art. II, Sect. 2, para. 1.

[3] Madison, 1 June (Farrand).

[4] Cf. Pinckney, Farrand, II, 328, 329: '. . . the President should be authorized to call for advice or not as he might choose. Give him an able council and it will thwart him; a weak one and he will shelter himself under their sanction'.

[5] The best accounts of the early developments of the Cabinet are to be found in Learned, op. cit., and Hinsdale, *History of the President's Cabinet* (1911). An account is also given in Short, *Development of the National Administrative Organization in the United States.*

and continuous onslaught upon the clause against ineligibility by the supporters of a strong executive (Wilson and Pinckney and Morris, for example), it maintained its position until the very end when an apparent impasse was reached.[1] Some, like Sherman, were for a single term of three years which would keep the Executive weak and allow rotation of the office. Others desired an original short term, say, three years, with re-eligibility up to a total of nine years, for that would enable the constituent body to get rid of an incapable executive at a fairly early date.[2] Re-eligibility for further terms was generally denounced as the obvious step to a life-term and monarchy,[3] and a too strong Executive. In proportion as this was pressed those who desired a strong Executive were forced into two alternatives, either a short period and re-eligibility, or a period longer than seven years. Partly as strategy, partly in earnest, these suggested eight, eleven, fifteen, even twenty years, and even a resolution for office 'during good behaviour' was moved. 'This was the way to get good government,' said Morris. 'Ineligibility tended to destroy the great motive to good behaviour, the hope of being rewarded by a reappointment. It was saying to him, make hay while the sun shines.'[4] The strong executives conceded even a six-year period in return for re-eligibility.[5] 'If the elections be too frequent, the Executive will not be firm eno'. There must be duties which will make him unpopular for the moment. There will be *outs* as well as *ins*. His administration therefore will be attacked and misrepresented.'[6] Too frequent elections were feared and this caused a period shorter than six years not to be accepted at this stage. Mutability of counsel was also feared. Then the long-termers, with positive ineligibility, recovered their position. As ineligibility was to be dropped from the constitution, they forced a term of four years only into it; for the short term might be enough to exhibit the incompetence of a President.

7. Finally, and bound up with the questions of the Executive's power and terms of office, the mode of selection was decided. The vague expectation was, at first, that the Congress or the Senate itself would choose the President. Strong objections soon became apparent, and they are best summed up by Gerry:

'There would be a constant intrigue kept up for the appointment. The Legislature and the candidates would bargain and play into one another's hands. Votes would be given by the former under promises or expectations from the latter of recompensing them by services to members of the Legislature or to their friends.'[7]

Further, it was foreseen that this must divide the legislature and the country into Parties, and this was seriously feared.[8]

[1] Farrand, II, 52 ff. [2] Ibid., I, 69.
[3] Ibid., II, 33 ff. and 50 ff., especially Mason. [4] Ibid., II, 33 ff.
[5] Ibid., II, 50. [6] Ibid., II, 59. [7] Ibid., I, 80. [8] Ibid., I, 103–5, 53, 54.

Now, the particular solution which was arrived at, indirect election by the people, was the inevitable outcome of the fundamental acceptance of the separation of powers and the contemporary dissatisfaction with legislatures. There is no doubt that to make the President the creature of Congress was to endanger his independence or theirs. The real question was, would not machinery arise to overcome the evil in such a development and to develop all its latent possibilities for good government? It was a question the Fathers were precluded from asking by their own theories of checks and balances, theories founded upon local and temporary conditions, and fears, only too well supported, engendered by their knowledge of corruption in English government. Further, to them and to the eighteenth century, the notion of a wholesome system of parties, of parties loyal to and working within a common constitutional frame, was unknown. Where we read party, they read *faction*, that is, something disruptive and subversive. So that for them there was no hope in control of government by the people: well-being lay in a proper balance of power within the governmental institutions themselves.

Hence their solution—a President elected by the same constituent body as the Congress; his authority independently obtained from the source of all authority, the people, and therefore exercisable independently of all restraint and concessions save that required by responsibility to the people. Yet the very things of which Gerry voiced the fear—'bargain play into one another's hands', votes exchanged for promises and expectations—all these have come about in spite of the Fathers' precautions. For government is impossible to day without the co-operation of Legislature and Executive, and to achieve this the Executive has been compelled to propitiate and consult, reward and coerce, the Legislature. But the chief instrument of their mutual approach is through the party system. In short, all the elements of a Cabinet system on the British plan are present, and operate: only American statesmen and students affect not to notice them, while they operate with the maximum of waste and the minimum of benefit, and sheer national obduracy prompts the continued damnation of the Cabinet system. But of this—later.

The Fathers were compelled to secure election of the President by the people, though they began by voting strongly against it. But there was substantial agreement that election must not be *direct*. The people were liable to deceptions; the people in large areas were too ignorant of the characters of men [1]; elective monarchies were turbulent and unhappy [2]; people would vote for their state candidates [3]; a majority of the people would not concur on any one candidate [4]; the people would be led by a few active and designing men (and will

[1] Farrand, I, 80. [2] Ibid., I, 72. [3] Ibid., II, 29. [4] Ibid.

not be better able to judge than the legislature)[1]; 'it were as unnatural to refer the choice of a proper character for chief magistrate to the people, as it would be to refer a trial of colours to a blind man'.[2] It was finally agreed that the people should choose the Executive through the medium of especially elected electors. The scheme almost shattered on the apportionment of electors among the states. Difficult enough it was to find a mode of representation in the Senate satisfactory at once to large and small States. Here was a similar trial. All hung upon the number of electors allowed to each State. The small states went back to election of the Executive by the Legislature as tactics to force a larger representation in the electoral college if election by the people were to be adopted. The question was postponed until the last moment, and then the States were satisfied by the resolution from the Committee on Unfinished Business,[3] that each State shall appoint a number of electors equal to the numbers of its Senators and members of the House of Representatives. These form the State electoral college.

In the case of a tie the Senate was to choose one of them for President, and if none had a majority the Senate was to choose from the first five on the list. The power of the Senate was a gift to the small States, who were there represented out of proportion to their population. The Vice-Presidency, created at the same time, was made appointable simultaneously by the same means as the President: 'in every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President, etc., etc.'. The provisions of the Constitution (Art. V, Sect. I, para. 3) were amended in 1804 by the 12th Amendment. The Amendment was made in order to avoid what had resulted from the operation of the original provisions: a Vice-President could be elected without receiving a majority of votes (John Adams in 1796) and President and Vice-President might be of different parties (Jefferson and Burr in 1800). Upon the Amendment of 1804 the method of appointment became: (1) Each State chooses, in such manner as its legislatures direct, the presidential electors. The number is the same as the number of Representatives and Senators in Congress to which the State is entitled. (2) The Electors meet in their respective States and ballot for President and Vice-President, *each voted for separately*, and lists being drawn up of the numbers of votes obtained by the various nominees. (3) The lists are sent to the President of the Senate (actually the sitting Vice-President of the U.S.A.). (4) If no person has an absolute majority, the House of Representatives may choose by ballot the President from the three top candidates; the voting is by States, each State having one vote only. (5) The Vice-President is the candidate with an

[1] Farrand, II, 30. [2] Ibid., II, 31. [3] Ibid., II, 497.

absolute majority, or if there is no such majority, the Senate chooses by ballot from the two highest members of the list.

What, then, had the Fathers of the constitution established? A Single Magistrate, alone responsible for the exercise of certain powers, without a formally constituted advisory council, with a large sphere of specifically granted executive powers, with some dubiety about the extent of executive leadership, and an indefinite participation in legislative activity. This Magistrate was to be elected by electors, who soon came to be chosen at large by the people.

Every one of these elements of the Presidency has changed his powers, his status, his responsibility, his appointment. We proceed to inquire what the Presidency is now, and why it has taken on its present character.

II

ELECTION AND EXECUTIVE LEADERSHIP

The Presidency has evolved under pressure of three great forces: the actual electoral process by which the President has come to be chosen, the need for co-ordination and leadership in government, even if the object is to do nothing, and the personality of the Presidents. It is an invidious task to begin with either of these three, for it is clear that they have interacted upon each other.

Let us begin with election. A plebiscitary Presidency has issued from the involved indirect procedure of the constitution. In the first two elections matters seemed to augur well for the system, for Washington was on both occasions elected unanimously. In 1796, however, in the contest between John Adams and Thomas Jefferson, understandings were reached before the colleges met, that the contest was between these two only. The next step was inevitable, when we reflect that in government men prefer controlled certainties to hazard and chance. In order not to scatter and waste votes upon a number of candidates, but to arrange that all should be cast in the same direction for the most pleasing men, two parties were organized: each put forward a candidate, the electors being chosen on the understanding that they would cast their ballots for the men named by the party which secured their election. From this contest onwards the electors have been nothing but the rubber stamps of the political parties, which secure their election and dictate the choice of President.[1] Thenceforward the Presidency became plebiscitary, and the agents of the plebiscite are the Political Parties.

It is clear that in a country so vast as the U.S.A., gigantic preparations must precede the election of the President, for in the end

[1] Cf. Stanwood, *History of the Presidency*, 1788–1897, Chap. IV, and Ostrogorski, *Democracy and the Organisation of Political Parties*, Vol. II, Pt. IV.

it is necessary that the whole Union shall be influenced to return a majority of electors, absolute or relative, for a pair of candidates (President and Vice-President). The stages of the process are now well-established: (1) to find candidates, (2) to make the public and the politician familiar with their characters and careers, (3) to obtain their nomination at the National Party Conventions, (4) to elect the presidential electors,[1] (5) to vote by presidential electors for President and Vice-President. The last two steps were originally the all-important parts of the procedure, they are now purely formal and are least important. The sources of the President's weakness and strength are secreted in the first three stages. (1) and (2) It is the custom to prepare the public mind, without letting that mind know that it is being prepared, months in advance of the National Conventions, for the acceptance of a certain name as a good candidate for the Presidency. What the few managers want is, first, the man who is likely to win, and next, the man who is likely to be pliable in the matter of policy and appointments, and thirdly, a person efficient in government. He must be able to engender popular enthusiasm and attract gifts of money and electoral service from the powerful and rich. If he himself has money so much the better. Those who have already attracted some attention as Governors of a State, or as Senator, or as a general in the U.S. Army have a certain advantage. The ultimate nature of the bargain made between such friends of the candidate—great party managers, often in the Senate, or controlling some party organization in an important state—is rarely divulged; and the choice is clearly determined by the relationship between his own personality and ideals and those of his friends. Once a bargain has been struck, or intimated, or inferred, and the managers are satisfied, an insidious instillation of the candidate's personality into the mind of the electorate begins, by specially engaged professional publicity-experts.[2] Further, the word is 'passed down' to the party managers of the most powerful of State political machines; for this enables the managers, if they are complaisant, to see that the State and local party organizations are ready for the Presidential primary elections. Again, hostages must be given, usually in terms of future appointments. All this from between twelve to eighteen months before the National Convention.

(3) The party conventions meet in June, some five months before the election of the presidential electors. Their purpose is to choose party candidates for Presidency and Vice-Presidency. Each State elects a delegation for the purpose, the number for each State

[1] By Federal Statute: U.S. Revised Statutes, Sect. 131, and Act of 3rd Feb. 1887, Ch. 90, Sect. 1: (1) Election of electors on the Tuesday next after the first Monday in November every fourth year; (2) second Monday in January following.

[2] Kent, *The Great Game of Politics*, p. 254 ff.

being determined by the National Committee of the parties.[1] In fourteen of the forty-eight States the delegates are elected by the direct primaries. In other States they are chosen by State conventions of the party. We have already explained why the primary system came into being—owing to ineffable corruption in the party conventions. The attempt was made, by presidential primary laws,[2] to give the electors the direct choice of delegates to the National Convention (as in New York), or to allow the direct expression of the electors' choice for president, or to combine these methods. The last-named system began in Oregon in 1910, and has, broadly, been copied in nine other States.[3] But the system is not widespread enough to overcome the machinations of the delegates and 'bosses' at the Convention; and further weaknesses are inherent in the particular systems in vogue, for some exact no pledge of the delegate, and it is never certain whether the presidential candidate named at the primaries is really aspirant for the office or not. Criticism is also levelled against the cost in money, energy and intra-party friction caused by the primaries.

One can be quite sure that a good deal of manipulation which would not bear the light of day in a moderately honest world has returned some three-quarters of the delegates to the Republican and Democratic party conventions.

The Conventions. Not the best, but the very worst, qualities of democracy are exhibited at the Conventions. A howling, screaming, demented mob of partially or wholly intoxicated men and women, numbering over 2,000 (as many alternates as delegates), meet to listen to speeches, to yell whenever their 'favourite son' or his gang of friends are mentioned, to bellow defiance when an opponent is praised. One of the candidates must obtain a majority of the votes of the various State delegations. Normally the State delegations, either by

[1] The Democratic Party allow to each State twice as many delegates as it has senators and representatives in Congress. (In 1924 the number was nearly 1,100.) The Republican Party (since 1923) allows each State one delegate per congressional district; and every State which cast its electoral vote for the Republican presidential candidate three additional delegates at large; four delegates at large for each State; and an additional delegate if it cast at least 10,000 Republican votes at the last election (cf. Sait, op. cit., p. 433 ff.).

This 'fancy franchise' is the result of the fact that the Republican Party finds practically no support in the States of the solid South. Party organization there is without hope or principle, and lives only for Federal patronage. But this helps those who have the appointments to use Southern delegates as they will in the Republican Convention, for the 'boss' delivers the kind of delegates desired. (Roosevelt, Taft and Coolidge took advantage of this for themselves or their successors.) Cf. Stanwood, op. cit. (1897–1916), p. 169, on the nomination of Taft in 1908; nearly all the contested (i.e. disputed) seats were in the Southern States. This situation has resulted in repeated demands for the exclusion or diminution of Southern Representation: to base it on voting strength, which is very small. This was done in 1921; but it was revised to the advantage of the South in 1923, it is said at Coolidge's request, to win him the nomination.

[2] Cf. Overacker, *The Presidential Primary* (1926).

[3] For details, cf. Sait, op. cit., p. 444, and Overacker, op. cit., Chap. II.

party rules or practice, vote as units. In the Republican convention a bare but absolute majority is required to obtain nomination; the Democratic Party requires a two-thirds majority. The balloting is oral—very. The speeches in favour of candidates plumb the depths of inebriate pathos. God, Providence, the Stormy Sea, and the Ship of State, Lincoln, the Fathers of the Constitution, and Patriotism, garnish these examples of rhetoric before which Aristotle would silently have wept—but they are mentioned only to lead up to the really important thing, to show what the country may expect of the Nominee. The moment the name is mentioned, the delegation from the nominee's native State entirely take leave of their senses, followed in this by supporting delegations. They usually remain utterly mad for about three-quarters of an hour, and they will prolong this time if the elements trying to restore them cannot prevail. An American friend urges that here I am not quite up to date: seventy-one minutes was the homage paid to Al Smith in 1928. They chant, sway, toss banners, march round the hall, punch off other men's straw hats and trample upon their own, thrust pictures of their favourite into the faces of rival delegates, while the crowds in the galleries re-echo their frenzied cries. Nor is this enough. Men may grow hoarse, or weak at the knees, before the fit passes off. Hence electric sirens are now introduced into the Convention, and inanimate things are treated to the luxury of an entirely human madness.[1] More, a fire-hose, suitably manned, is in readiness as the Chairman's ultimate restorative. Ballot after ballot is taken until some candidate 'breaks away' and gets the necessary majority.[2]

But the issue is not settled by the lunatic delegates. They ultimately gesticulate and croak to the terms of the bargains made by the old, wise and powerful men of the party in their hotels, who trade policies, ambassadorships, Cabinet posts and State appointments, for votes.[3] And it may happen that an entirely 'dark horse' is the only one who can 'pull' all the necessary votes.[4] So much the better for the managers.

The nominations made, attention is concentrated on the campaign,

[1] Cf. Ostrogorski, op. cit., II, 267 ff.; Sait, op. cit., p. 466 ff.; and the Accounts of the Democratic Convention, 1924, in *New York Times*, reprinted in *Literary Digest*, 12 July 1924.

[2] Cf. Munro, op. cit., p. 122: 'James A. Garfield, in 1880, was nominated on the thirty-sixth ballot. Woodrow Wilson, at the Baltimore Convention of 1912, was not chosen until forty-six ballots had been taken. And, finally, at the Democratic National Convention of 1924 it required one hundred and three ballots to reach a nomination.' Yet, in 1928, Hoover and Smith were nominated on the first ballot in the Republican and Democratic Conventions, respectively.

[3] Cf. Kent, op. cit., p. 247; Tumulty, *Woodrow Wilson as I know him* (1925); Johnson, *Life of George Harvey* (1929); Lodge, *Correspondence*; Stephenson, *Aldrich*.

[4] Cf. Holcombe, op. cit., who points out that in view of the state of tension which exists between sections, any candidate representing any section too conspicuously must necessarily be voted down and the least obnoxious, instead of the most appropriate, man be chosen.

which lasts from July to November. In those months the National Committee of the party must accumulate its funds, decide on its slogans, distribute its 'platform', 'sell' its candidate to the people at large, in order to reap a majority of presidential electors in November. Of course, the omens are scrutinized, and where a State is doubtful, but possible, a special dose of speakers, literature and expenditure is administered. The most deplorable and degrading tactics and oratory are used. All the organizations, business men's clubs, women's groups, are manipulated. It is the privilege of the candidate to designate the 'campaign manager', and to give the lead in matters of policy—governmental and tactical. The manager, on the other hand, uses the President as he thinks best—he is sent out on a tour of the country and speaks from the end of a train like Roosevelt and Harding; or sits at home on the porch ready to greet neighbours, who, queerly enough, contrive to get their interviews accepted by newspapers with a wide circulation; or he broadcasts by wireless, as in the case of Hoover, if he is better at that than at addressing meetings. 'Campaign biographies' of the candidates are prepared with a flattering photograph, a more flattering narrative of the rise from obscurity and poverty to celebrity and 'service', and most flattering prophecies of future eminence and usefulness. Extraordinary things begin to happen to candidates: the crowing of a cock saves one from death in a railway accident, another is discovered pitching hay with the dexterity of an experienced farm hand. Startling 'exposures', 'forecasts' are made. And the issue is, little by little, settled.

There is a fly in the ointment, however. If there is one thing upon which Americans insist, it is numerical justice. Now it does not always happen that the number of electoral votes is proportional to the number of original votes cast for candidates. There is usually election at large in the States for the electors, and this means that the successful party sweeps *all* the representation, the unsuccessful party *none*. When the winning candidate then wins the States with a large number of electors, the popular vote may be unproportional to his votes, and even a minority. For example, in 1876 Hayes polled only 48 per cent. of the popular vote but just over 50 per cent. of the electoral vote; Tilden, the defeated candidate, 49·8 per cent. and 51 per cent. respectively; and in 1880, Harrison polled 58 per cent. of the electoral votes but only 48 per cent. of the popular vote, while Cleveland, defeated, polled 42 per cent. and 47 per cent. respectively. Moreover, where there are more than two candidates one may become President with a minority of both electoral and original votes, and this has happened twelve times out of thirty-one in the history of the Republic. But it is perhaps more important that reforming vigour should be spent upon the steps leading up to the nomination of candidates than upon the counting of the votes.

The Programme, the President and Leadership. From the moment the candidate is nominated he is the formal leader of the party. Before that moment, unless he is a President being renominated, he was not a *national* leader; after his term, should he become President, he drops out of national leadership. But in what sense is he leader? He has no such continuous part in the formulation of a programme as the Prime Minister of England's. Frequently, the most important issues are decided by the Prime Minister and his immediate colleagues years before they ever come to office. They are the subject of careful and searching thought: the memoirs of Peel, Disraeli, Gladstone and Harcourt are more than ample testimony to this. We can properly say that the Prime Minister and his colleagues *are* the programme: for it is not a thing external to them to be donned and doffed for elections. The pledge of a British Cabinet is one which is often made before it becomes the Cabinet; fulfilment is expected while it is in office; and the Cabinet recognizes a loyalty to a pledge after it has left office, if not to maintain it intact, then to alter it as the situation demands, and to answer for that alteration. The responsibility of a British Cabinet begins the moment political events mark out its members for future leadership: it hardly ever ceases for the rest of their Parliamentary life, and that ends usually only when they die.

Not so in the U.S.A. The President is the leader *ad hoc* and *pro tempore*. He proceeds from obscurity, and passes to obscurity, by way of four or eight years of formal primacy. I say formal primacy: for he is not consulted early enough on the party programme to influence it, though Bryan, as a candidate, and Roosevelt, Taft and Wilson were, in part, exceptions to this; the programme is voted by the convention before the balloting for President begins; the programme is made for electoral purposes and not for Presidential guidance, and no one expects the President to insist that it be realized, nor could it be, since it is full of contradictions; and the candidate's speech of acceptance is often too vague to mean anything in terms of actual government, and when it is not, as with Taft in 1908, or Wilson in 1912, it may, with entire impunity, contradict the platform on the most important particulars, or dismiss it with a remark like that of Wilson's: 'the platform is not a programme'.

The truth is there is no continuous organic connexion between the candidates and their party, or between the candidates and the hundreds of members of the same party who are already Congressmen or now standing for it. The reason why there is no such connexion is that there is no national party system in the U.S.A. There are State party systems in which regular organization, and activity, and personal relationships are continuously maintained. But they are occupied with State, not national, affairs. The national party is simply

a loose and temporary federation of State party managers and their lieutenants with the addition of certain outstanding national personalities [1]; it comes into being every four years, works intensely for six months or thereabouts, through the National Committees and by the guidance of its Chairman, and then fades out of effective existence. Thus the President is 'sold' to the people on terms he does not invent or dictate, he is 'put over' on terms different from those offered by his party colleagues in Congress, and no responsible party organization remains in being to which he can turn for advice, or which may insist on the keeping of pledges.

What is the result? The President has been 'sold' to the people as the greatest man in the world. He speaks for four years with the authority derived from an extraordinary state of popular belief in him. The eyes and expectations of the whole people have been focussed upon him as a saviour.[2] He has come to be looked upon as a leader, but as a leader without pledges. What he does now depends upon his own character, and the extent to which he can induce Congressmen to accept his suggestions. He is a plebiscitary executive, with limited powers, but large potentialities. What are the conditions which now determine the effectiveness of his leadership? Let us consider his instrumentalities first and his character afterwards.

THE PRESIDENT'S POWERS

1. He has certain executive duties. These are (*a*) the leadership of administration, substantially and financially; (*b*) commandership-in-chief of the Federal forces, the treaty-making power, and the conduct of international relations; (*c*) war-powers; (*d*) the pardoning-power. These have, by the natural increase of governmental business at home, and the development of international connexions, caused the office of President to grow in the extent of its power and the amount of its discretion.

Administration. (*a*) The United States, in spite of its adherence to the policy of governmental *laissez-faire*, has not been able to avoid a vast addition to the laws prescribing Executive interference with the behaviour and pursuits of individuals and industrial and social groups. As everywhere else, so in America, large discretion in the creation and

[1] Like Mark Hanna (cf. Croly's *Life*) and Will Hays of the Republican Party, at one time Postmaster-General.

[2] Cf. Taft, *Our Chief Magistrate and his Powers* (1916), p. 52: 'The President so fully represents his party, which secures political power by its promises to the people, and the whole government is so identified in the minds of the people with his personality that they are inclined to make him responsible for all the sins of omission and of commission of society at large. This would be ludicrous if it did not sometimes have serious results. The President cannot make clouds to rain and cannot make the corn to grow, he cannot make business good; although when these things occur, political parties do claim some credit for the good things that have happened in this way.'

application of rules has had to be given to executive officers or commissions, like the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board, the Tariff Commission and the Shipping Board. Now, it is true that Congress establishes the offices, and lays down the outer limits of their discretion, but it does not of itself appoint the officers, it cannot remove them (while the President can), and the supervision over the whole, the determination whether the execution shall be active or passive, lies with the President and his Cabinet. Conspicuous examples occur in the administration of the Anti-Trust Laws, Prohibition, the Post Office, the Civil Service. Jackson even had the Government deposits removed from the U.S.A. Bank to State banks in defiance of the very deliberate, expressed will of Congress. Especially through the Attorney-General who institutes proceedings against those violating Federal Law is the President's power enormous. A large ordinance-making power has been developed: in the matter of tariff arrangements, of public lands, and other matters, the discretion of the President and his executive officers has been the subject of great extension. All this cannot but draw the attention of the public to the President, and give him great weight with individual Congressmen. The whole tendency of government is, in short, to focus attention upon the President, and encourage the expectation that he, in default of any other appropriate agency, will secure the proper and co-ordinated march of administration.

This tendency is partly exemplified and promoted by the position given the President by the Budget and Accounting Act of 1921. Of its meaning in terms of legislation and Congress we have already spoken: for the Presidency it has a special significance. For it has been admitted that a centre, not only of executive control, but of financial, which means legislative control, is essential: and it has been further admitted that that centre is properly the President. Not that he, personally, was required to receive, compare and harmonize departmental estimates, or to compose a financial plan of ways and means. It was, of course, understood that a Bureau was required, with an energetic chief officer. But it is the agency of the President, it works in his name, he submits the Budget to the Congress: more, when the Director of the Budget is in personal difficulties with refractory Departments, he has the moral authority, sometimes the personal intervention, of the President to settle them. Moreover, the President has been given a personal position as head of the 'Business Organization of the United States',[1] the officers in which association he annually addresses. An extra, and an important piece, has been added to the personal authority of the President by this reform—for the removal power of the President is the sanction of any

[1] *Fourth Annual Meeting of the Business Organization of Government*, Jan., 1923, p. 9.

personal intervention which the Director of the Budget may have to demand of him.[1] The President has very strictly forbidden executive officers from appearing before Congressional Committees to obtain increases of the appropriations as endorsed by the Bureau of the Budget. It is most interesting to remember that in the France of the *ancien régime* the Comptroller-General of Finance was the centre of administrative power.

Nor is that all, for (*b*) the Presidency has on several occasions, at the inception of the Republic, during the Civil War, during industrial strife, and in the World War, suddenly assumed powers of tremendous effect upon the lives of citizens, under his power as Commander-in-Chief. It is agreed that as Commander-in-Chief he may do anything to overcome the enemy. This power was used by Lincoln to suspend Habeas Corpus in States outside the scene of hostilities, to emancipate slaves in the slave States ; in the World War President Wilson obtained and used powers commensurate with almost every particle of the national life.[2] It is not that a sweeping discretion is vested in him—it is that the prestige of the office cannot but grow to gigantic proportions. Nor has the discretion of the President been limited to commandment within America ; Russia has been invaded (1918), Mexico often invaded, Peking defended (1900), and numerous operations on foreign territory carried out. Further, of recent years civil disturbances, due to the chronic dissensus between capital and labour, have called forth the use of Federal forces—under the Presidential right to use the militia or the army or the navy whenever by reason of obstructions, assemblages, or selection Federal laws cannot be enforced by the usual means. Thus in 1894 President Cleveland intervened, even against the State Governor's protest, to safeguard the mails during the Chicago strike. Since that time no use has been made of the power, but it has often been invoked, and the invocation is addressed to the President.

[1] Cf. General Dawes, Director of the Bureau of the Budget (*Message of the president . . . and the report of the bureau of the budget*, 1921, p. 36) : 'It cannot be too often reiterated that this most important reformation in the governmental business system is dependent upon the President of the United States himself, and upon his continued assumption of his responsibility as its business head. The minute he relaxes his attitude or his attention to this duty there will be felt the natural pull of the departments and establishments toward the old system of complete independence and decentralization. This is because of laws firmly embedded in human nature which have existed since man began. Budget laws or other legislative enactments cannot change human nature, and, while compelling the letter of co-operation, cannot compel its spirit, which is, above all things, essential in business organization. The President, and the President alone, can do this, for his attitude toward the heads of the departments and the independent establishments is a matter constantly in their minds. What he desires it becomes their interest as well as their duty to do, where consistent with right principles and in accordance with law. In the absence of his expressed desire what becomes their selfish interest in action is inevitably along the lines of decentralization and the re-establishment of the old condition of things, with everything running haphazard.'

[2] Cf. Berdahl, *War Powers of the Executive in the United States* (1921), *passim*.

Foreign Affairs. Both power and prestige have fallen to the President in a large and increasing measure by virtue of the power to make treaties and conduct international relations. The former power is expressly conferred upon the President (with the consent of the Senate); the latter is not expressly conferred, but is inferred from his express constitutional power to nominate and receive diplomatic representatives, the treaty-making power, and the power to give Congress information on the state of the Union. The President cannot declare war; that is the right of Congress; and he must remember that though he has the initiative in foreign negotiations, if their purpose or possible outcome is a treaty the Senate had better be approached before commitments go too far. How far the President is so bound we have already discussed in the section upon the Senate, and we need not traverse the ground again. Let us point only to the defeat of President Wilson's Versailles policy in 1919 as a sign of Senatorial power. That instance shows that in the case of a major and exceedingly grave national engagement the President's policy, if it is to be valid, cannot be his alone, but must satisfy the Senate. It also reveals other things: a President whose party does not control at least the Senate is apt to be a weak and frustrated President, in this, as in domestic affairs. It shows, too, how anxiety for the result compels the President to seek preliminary accord with Senators.[1] But, further, it makes clear that the President may appeal from the Senate to the people, in the hope that Senators will be influenced by the constituencies and the various policy-groups, in the hope, even, that at approaching renewals of the Senate his policy may cause the defeat of his opponents and the election of his supporters. But the conditions of success are hard: the policy must be sensationally vindicable, the President must be personally popular, and he must split the 'bosses', so that the machine does not work entirely against him. In Wilson's case the conditions were not fulfilled; in Hoover's success was just attained.[2]

The President does, however, speak to his own nation, and to other nations, through his messages to Congress, and on other casual occasions, and he may secure Congressional support in this way: both Roosevelt and Wilson were often successful in this. Short of ultimate stultification through the Senate's power over treaties, the President has a vast field of individual power. He is the sole recognized organ of communication with foreign governments: all the great constitutional jurists and the precedents have denied the power to any other

[1] Cf. Fleming, *The Treaty Veto of the American Senate* (1930), Chap. VII. President Wilson's request that he might appear before the Foreign Relations Committee of Congress in Feb., 1919 (to report on the Covenant of the League of Nations), was refused. Cf. also Johnson, op. cit.

[2] Cf. *The New Republic*, 21 May 1930, *Billion Dollar Parity*; 23 July 1930, *Norris saves the President*; 30 July 1930, editorial, p. 299.

body in the American system.[1] The President acts through, and alongside, the Secretary of State, who occupies a position of primacy in the American Cabinet after the President, and, in fact, forms with the President a kind of 'inner Cabinet'. The use of their power by Hoover and Stimson in 1931 to obtain a moratorium for German Reparations Payments is a signal illustration of its scope. The President has the appointment of Ambassadors, Ministers and Consuls; here the Senators' confirmation is required, and this means that party arrangements and pledges must be kept. The plums, like the Ambassadorship to Great Britain, are usually awarded to the man to whom the President is much obliged for his nomination and election—for example, President Harding and Ambassador Harvey.[2] There have been long and laborious disputes whether Congress may lay down binding qualifications for diplomatic and consular offices, but the better view, indeed the prevailing view, has been and is that these are only recommendatory. The President may bind himself to appoint only those who shall have passed certain tests, but no one else can bind him.[3] But practice has resulted in certain important Presidential appointments without Senatorial confirmation: 'special agents', to help the President by negotiating a specific treaty, or to make investigations. Between 1789–1888, 473 persons had been so appointed to conduct negotiations; and of these all but thirty-two were appointed without Senatorial confirmation.[4] Of recent years the most conspicuous examples of such appointments have been President Wilson's, during the Peace Negotiations of 1919. This caused such a reaction that the Senate in discussing the Treaty of Versailles proposed among other reservations, to stop such appointments to the Assembly or the Council of the League of Nations, or the commissions or other bodies under the Treaty.[5] There is no doubt that the President is able, by the appointment of special agents, to escape the trammels of the constitution in the matter of diplomatic appointments. It is clear, however, that where *spies* are necessary such a method is essential. The main lines of the policy are laid down by the President (of course, in co-operation with his Secretary of State) and his agents, whether Ambassadors, Secretary of State, or special, receive instructions from him, report to him, and are relieved by him.

[1] Cf. Mathews, *American Foreign Relations* (1928), pp. 235–40.

[2] Harvey says that of eighteen editors of the *North American Review*, one became Secretary of State; two ambassadors to Britain; two to Spain; one to Russia; one Minister to the Netherlands; one to Brazil (cf. Johnson, *Life of George Harvey*). The Embassy to France was offered to Harvey (who refused).

[3] As, for example, by the Executive Orders of 27 June 1906 and 26 Nov. 1909 (see *Civil Service Reports*).

[4] Senate Doc. 231, 56th Cong., 2nd Sess., part 8, pp. 337–62. Cf. Wriston, *Executive Agents in American Foreign Relations* (1929).

[5] Cf. Wright, *Columbia Law Review*, 138, Feb. 1920, and *Cong. Rec.*, 15 Nov. 1919, p. 9053; 19 March 1920, p. 4899.

The energetic stand taken by Wilson against Lansing over the Treaty of Versailles, and the recent examples of Presidential initiative and mode of operation in the London Naval Conference illustrate very well the power possessed by the President.

Now, what has been so far said amounts to this: that the President has the initiative in foreign relations, that he has a large power in the choice of his agents, and that through them he maintains the rightful claims of American citizens at home and abroad. We have also seen that where those claims are to be affected or amended by treaty his power is subject to certain limits. Can he therefore do nothing decisive without Senatorial support? In fact, he has a very large field of decisive discretion where it is good for him to have Congressional support, but it is not essential for him to seek it, for neither law, which always embarrasses the conscience, nor the political balance of forces, requires it. Presidents have entered upon the acquisition of territory by such adroit methods as to succeed without a treaty—Texas was thus annexed, so also the Hawaiian Islands, Santo Domingo and Haiti. Presidents have assumed the power of recognition—which is the rightful authority, and which the rebellious?—when countries are in a state of revolution. This power has been of enormous significance in the history of diplomatic relations with the South American Republics, and in their domestic destiny, and it played a considerable part in the early years of the Russian Soviet Republic.[1]

The President also has a power of a treaty nature: that is, the power to make agreements on his own authority, called Executive Agreements; and these may be treaties of minor importance. The power is inferred from the distinction made in the Constitution between treaties and 'agreements' or 'compacts'[2]; and the constitution does not say that Congressional assent is needed for the latter. These agreements may be incidental to the President's general diplomatic power and commandership of the armed forces, or he may receive the grant of power from Congress as an incident of its power regarding foreign commerce, copyright, and postal affairs. All in all, these Executive Agreements constitute an important sphere of executive discretion, and the power has been used with great effect, for example, North American fishing rights were regulated in 1888 between the U.S.A. and

[1] Cf. Howland, *Survey of American Foreign Relations*, 1928 (pub. for Council on Foreign Relations), p. 102: 'The President has maintained his prerogative in the matter of recognition and the use of forces abroad for defensive purposes in the face of continued efforts at congressional interference expressed in congressional resolutions, hearings and calls for documents on such subjects as Mexico, Haiti, Santo Domingo, Nicaragua, Ireland, Russia, China, and oil.'

Buell, *International Relations* (2nd ed., 1929), p. 414. The United States refuses to recognize the Soviet Government until it admits its liability for the Kerensky loan (of 1917).

[2] Cf. Art. I, Sect. 10, 1 and 3, and Willoughby, *The Constitutional Law of the United States*, Vol. I, Sect. 294.

Great Britain, the international settlement of the Boxer Rebellion was thus established, many Postal Conventions have been made, Tariff arrangements settled, and the 'open door' policy in China established in 1899 and 1900, and, since 1900, Far Eastern policy and a quota for Japanese immigration defined. It is clear that this is important power; which, moreover, is exerciseable without that publicity which has come to be one of the most beneficial axioms of modern government.

The Executive plays a large part, with the Courts and Congress, in the enforcement of treaties and agreements: it plays almost a sole part in their current interpretation. Although Congress has the power to declare war it has never done so excepting upon the express or inferred suggestion of the President. Since he has the initiative, the most immediate relationship with foreign power, the earliest and the most detailed information, it is quite clear that his reaction and response must be of peculiar effect. In 1807 war might have been declared against England had not Jefferson avoided the calling of a special session just when people were most excited; and during the American Civil War, during the *Alabama* excitement which followed, during the inflammation against Mexico in 1913 and subsequent years, Presidential action was able to steer away from the obvious readiness of Congress to act violently. Again, the policies of neutrality, armed intervention, and so on, as we know so vividly from experience in the World War, are very much in the hands of the President, as to mode, time, tactics and the evocation of a national response. Further, the President is in a position to threaten with war, and to take preliminary and preventive action,[1] and so to conduct negotiations that the hand of Congress is necessarily forced. Who, further, has the power to terminate war? The President alone has power to suspend hostilities —and this is done by protocol and proclamation. But a state of war has not thereby ended.[2] To a state of peace some further declaration is required; and this happens normally by treaty (where Senatorial confirmation is necessary).[3] Outside this there is considerable doubt as to procedure. Wilson vetoed the Congressional resolution of April, 1920, declaring peace with Germany, but Harding in June, 1921, approved such a resolution. Wilson denied his own power to proclaim a state of peace.[4] In the Civil War the Supreme Court was satisfied with Presidential proclamation,[5] in subsequent affairs it has seemed to rely upon Congressional action.[6]

Thus, the President has exceedingly large powers in foreign policy—a field of discretion far wider than that exercised by the Executive

[1] As in the dispatch of the *Maine* to Havana harbour. Cf. Berdahl, op. cit., p. 91.
[2] Cf. Moore, *Digest of International Law*, Vol. VII, p. 153.
[3] Thus, the Secretary of State's judgement as between Spain and Peru, in 1868, ibid., p. 336.
[4] *Cong. Rec.*, 22 Aug. 1919, pp. 4434, 4435.
[5] *The Protector*, 12 Wall., 700. [6] *U.S. v. Anderson*, 9 Wall., 71.

in any other country which calls itself a democracy. Let us rule out the Presidential powers of France and Germany, for they are formal by comparison with that of the American President: yet, even the Cabinets of Europe and Britain are subject to effective constitutional restraint. Not only must those of Europe be continuously watchful of the Foreign Affairs Committees of the parliamentary assemblies, and treaties be ratified by Parliament, but the party system acts as an incessant restraint upon, or goad to, the Cabinet. This is not cut off as the American President is from an organic connexion with the sources of opinion and desire. There is never a day when European Cabinets can act without regard to the attitude of a number of political leaders: these cannot be disregarded, and if they are immediately ignored they must presently be answered. But in the U.S.A., the President and his Cabinet are the last relics, upon an isolated summit, of a dispersed party. They sit upon the summit for four years without reasonable chance of overthrow. They may even withhold information from an anxious Congress, and scorn its recommendations with complete impunity. It is true that Congress may raise its voice in protest, true also that the President will seek to march with his colleagues in Congress rather than without them, and it is equally true that he will have some regard for his party's prospects at the next Congressional and Presidential elections. Yet the extent to which he surrenders to these forces, depends very largely upon himself, for Congress, and his friends, and his party have little with which to coerce or rejoice him. It seems to me that in this case the Fathers of the Constitution obtained what they wanted; and the result is not, I think, good either for the U.S.A. or the world. It was precisely in the war powers and in foreign policy, that the Fathers desired a single, unchecked and vigorous executive: they have attained it, and even the power of party has been unable to overcome this dictatorship, which may be good or evil, according as the man is wise or foolish, but not as the citizen body, enlightened as well as parties may enlighten them, might desire.[1]

[1] J. B. Mathews, of the University of Illinois, has written one of the best books on this subject. Yet I cannot agree with his conclusion (Chap. XXX). He says that 'despite the theory of the constitution, as thus outlined, the President has in practice assumed a degree of power which is almost tantamount to a dictatorship in the conduct of foreign relations'. With that I agree. It is truer than he supposes when we compare it with European democracies. But the theory of the Constitution, *as he outlines it*, is surely not warranted by anything we know of the work of the Fathers. This is what Mathews says (op. cit., p. 602): 'In providing for the conduct of foreign relations the framers of our Constitution were guided by two main motives or attitudes: (1) high regard for the principle of separation of powers, and (2) jealousy of arbitrary executive power as exemplified in old-world institutions. Hamilton pointed out in the *Federalist* that the King of Great Britain was "the sole and absolute representative of the nation in all foreign transactions". The founders of our republic, however, had no intention to make the President a dictator in foreign relations. They were men of sufficient practical acquaintance

(2) We have seen, then, that the President has both power and prestige of a high order in executive matters. These are used to acquire *legislative* power, for who can resist an already powerful person, whose prestige, moreover, attracts popular interest and therefore spells votes for or against Congressmen? But the executive powers of the President serve also to make possible an effective intervention in the making of laws, and this comes of (i) the appointing power and (ii) the veto and the message power. These are closely bound up with the party system. When we have described these, we shall be in a good position to assess the meaning of the President's Cabinet; and to understand the value of the Presidential Executive as a factor in modern government.

(i) **The appointing power: and the power of removal.** These powers would be worth little to the President if they were governed by the considerations and rules which operate in the Civil Services of Europe, for these limit the discretion of the Minister save in the matter of the very highest and some extraordinary appointments. But in the United States it is only of recent years that party favouritism in appointments to and removals from office has been limited to any large extent, and even now, as we shall see in a moment, the patronage available for a President is enormous. Congress may by law vest the appointment of 'such inferior offices as they think proper' in the President alone, in the courts of law, or in the heads of departments. The definition of 'inferior' offices is not given in the constitution, but in practice the Congress has included none above the level of what we should in England call the 'executive grade'; and of course, of the great bulk of officials falling beneath this margin, the appointments of a large number have not been so vested that they come under Civil Service rules. Other offices, above this margin, are appointable by the President with the advice and consent of the Senate. The question here is how many offices altogether are now the subject of patronage? About 20,000, carrying a substantial salary.[1]

with public affairs to know that the chief executive must be given a large measure of control in this field. None the less, they rigorously applied the principle of checks and balances by requiring the concurrence of the Senate both in treaty-making and in diplomatic appointments. Moreover, they deemed it wise that in the determination of peace or war the direct representatives of the people should have such a degree of control that no declaration of war could be issued without their consent. This was at the time a striking innovation, an arrangement paralleled nowhere in Europe, and it *apparently represented the establishment of a broadly democratic basis for that phase* of our foreign relations which touches the interests of the whole people most closely.'

I think he has left out of account the clearly expressed intention of several of the most influential members of the Convention, and, also, the contemporary feeling against the legislature.

[1] The following figures are given in the *Civil Service Report*:

30 June, 1927

Employees in the entire Executive Civil Service	559,138
Positions subject to competitive examination	422,998 (75% approx.).

Therefore 137,140 offices appear to be under the patronage system. Of this

How is this power used? Two conditions govern it: the President cannot personally discriminate between the worthiness of the applicants, since he has not the time to make himself acquainted with the nature of the situation or the ability of the men; and secondly, it is a power with which he can purchase the support of his colleagues in Congress, or at least buy out their opposition, and with which a stiffening of continuous loyalty, or, rather, servility, can be created and maintained in the State party organizations. We need not bother to support or explain the first condition: it is clearly written in the nature of things. It is enough to say that Presidents are pestered out of their lives—actually—for the first President Harrison died of overmuch solicitation; the second Harrison wasted half his time in the first half of his Presidential term attending to patronage, while Garfield was assassinated by a disappointed office-seeker. But some of the negotiations for patronage are really comic.[1] Presidents have admitted that they are compelled to take the advice of the Senator and Representatives from the sheer number of applications and the technical impossibility of knowing what decision to make.[2] The President is compelled by law to consult the Senate. In most cases this has meant that the Senate itself, by its own domestic arrangements, contrives to nominate as well as to confirm. This practice, known as 'Senatorial courtesy', hinges upon the convention, that the Senate will normally, regardless of qualifications, refuse to confirm nominations if the Senator or Senators from the State involved object to them. Of course, the Senators must be of the President's party,[3]

number about 16,700 are confirmed by the Senate; the employees thus appointed are mostly field officers such as postmasters, collectors of customs and internal revenue, and marshals. To these must be added the consular and diplomatic officers.

In 1889, according to Foulkes (*Fighting the Spoilsman*, p. 58), the Republican members of the House of Representatives had each about 250 appointments in his gift.

[1] Cf. Letter of President Harding (3 Sept. 1921) to Thoresen, Surveyor-General of the Land Office for the District of Utah (Mathews and Berdahl, *Readings*, p. 152): '. . . I need not tell you of the current demand for the recognition of aspirants within our party for consideration in the matter of patronage. . . . In all courtesy I would infinitely prefer to have you recognize the situation and make your resignation available. I am writing this letter in a kindly spirit to express a request that you recognize the situation and let me deal with the situation as you would probably wish to do if our positions were reversed' (printed in *N.Y. Times*, 23 Sept. 1921).

[2] Cf. Roosevelt, *Presidential Addresses and Papers*, '*The Presidency*', 1, 5; and Taft, *Four Aspects of Civic Duty*, p. 98.

[3] Cf. discussion in the Senate on the nomination of Nat Goldstein to be Collector of Internal Revenue in Missouri (*Cong. Rec.*, Vol. 62, pt. 7, pp. 6555–7, cited in Mathews and Berdahl, *Readings*, pp. 155, 156) (McCumber): 'Let me state to the Senator what is the usual course in such matters. The moment any nomination is sent to the committee, the chairman hands that nomination to some Senator and asks him to consult with both the Senators from the State of the nominee to ascertain whether the nomination is satisfactory to them.

'That is the first step to be taken, and it is the step which always has been taken, whether the Democratic Party or the Republican Party has been in control. If the nomination is satisfactory and if it is so reported to the committee, the com-

and where there are no Representatives or Senators of the party then the local party leaders are consulted. There are, of course, understandings between the President and Senators: in some cases the President is able, politically, to override the Senator concerned on the plea that the appointment is a 'personal' one upon which he has set his heart. This is especially possible in positions situated in Washington and abroad, for then the strength of the equity of local residence does not count, and men like Roosevelt (he was himself Civil Service Commissioner under Harrison's administration) have insisted upon personal choice for really responsible positions. Normally the power is used for the good of the party as a whole, and this means that the Senator, consulting often with the Representative from the district concerned, will have *carte blanche* to bolster up his following. *Carte blanche* is often the price paid by the President for his nomination, and it has been promised in pre-convention or convention days.[1] But it can be used, and it has been used effectively, to promote the foreign and domestic leadership of the President. Lincoln, for example, used the power to get Nevada organized as a State, since he required to be sure of enough States to ratify the 13th Amendment abolishing slavery in the United States.[2] Under McKinley and his manager, Mark Hanna, the matter was brought to a fine art.[3]

The President has an extra power which enables him in some cases to evade the Senate's confirming power; he may fill temporarily any vacancy that may occur during a recess of the Senate. This should be submitted for confirmation at the next session, but notwithstanding any objection the appointment may hold good until the end of the session. Upon refusal to confirm, the same person may be continued in office, and reappointed to the vacancy at the end of the session; and so on. The most important instance of this kind was the scandal associated with the attempted appointment of Charles B. Warren as Attorney-General by President Coolidge, who wished to avoid a rebuff by the Senate. We return to this instance later.

It is clear that the President's executive power is importantly enhanced by his appointing power, and that his legislative power is similarly enhanced. But the power would lack weight were it not for that of Removal, for that is at once a sanction of administrative discipline, and a constant threat to the security of the Senators' nominees. At any moment, by the use of the power, the President can threaten a Senator in a matter important, sometimes vital to his

mittee act upon it. If, however, any extraneous matters have come to the attention of the committee to indicate that there will be opposition to the nomination, then, of course, the nomination is held in abeyance until such opposition may be heard.'

[1] Cf. Gosnell, *Boss Platt*, *passim*; Foulkes, op. cit., p. 49; Overacker, op. cit., p. 83.

[2] Cf. Dana, *Recollections of the Civil War*, pp. 174–7.

[3] Cf. Croly, op. cit., pp. 296–8.

own legislative career. Now the constitution says nothing about the power of removal. In regard to inferior officers who are, by law, appointable by the heads of departments, the Courts have held that the power to remove is limitable by Congress.[1] More doubts arose about the power in regard to officers appointed by the President alone, or with the Senators' concurrence. The First Congress held that the President had the sole right of removal (this was in the debate, already mentioned, in which the nature of the executive vesting clause was in issue). Between that time and 1867 the President exercised unlimited power. But in 1867 the Tenure of Office Act was passed, as an incident of the contest between Congress and President Andrew Johnson, a Congress vindictive in the extremest degree against the Southern States, and a President who desired to proceed to a conciliatory reconstruction of the South. Congress made the President guilty of a 'high misdemeanour' should he remove an office-holder without the consent of the Senate. The law was passed over his veto: and in fact it was invoked in his impeachment. In 1887 the law was repealed. Yet, though the President now suffered no legal limitation, and in practice acted as though there were no limiting authority, the implied limitation expressed by Hamilton in the *Federalist*, that 'the consent of the Senate would be necessary to displace as well as to appoint',[2] has been strongly upheld by some able commentators.[3]

The issue was not squarely faced until the case of *Myers v. United States*,[4] argued first in December, 1924, and decided in October in 1926. In this case President Wilson had, in 1920, removed Myers, a postmaster in Oregon. Myers claimed four years' salary on the ground that Congress had fixed the terms of postmasters at four years and the President had no constitutional power to remove him until the time had elapsed. The Court of Claims disallowed the claim, and appeal was to the Supreme Court which made a thorough examination of the whole question. The Court decided in favour of unlimited Presidential power by a 6–3 decision. The decision of the Court was given, curiously enough, by Chief Justice Taft, who was from 1908 to 1912 President of the United States; and I have no doubt that his judgement was coloured by his own experience. It was emphatically in favour of exclusive power of removal for the

[1] *U.S. v. Perkins*, 116 U.S., 483 (1886).

[2] Cf. *Federalist*, LXXVII, 390: 'A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favour of a person more agreeable to him by the apprehension that a discountenance of the Senate might frustrate the attempt and bring some degree of discredit upon himself.'

[3] Cf. Burdick, *The Law of the American Constitution* (1922), pp. 64, 65.

[4] 272 U.S., 52 (1926), 127–77.

President. The opinion said that to allow the power in Congress was to be out of keeping with the plan of government, by giving to Congress 'the function of defining the primary boundaries of another of the three great divisions of government; the Fathers had not added this power to those enumerated for Congress; and the *general* grant of executive power to the President was significant'. The tables were turned on those who sought to argue that the President had a limited power:

'The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate (*observe this twist of meaning!*), and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the executive is a convincing indication that none was intended.' [1]

Then follows an analysis of the governmental expediency, not the law, of allowing to the President unrestricted power regarding the most important of his subordinates.

The doctrine is taken even further to cover offices appointable by heads of departments, and acting according to terms laid down by Congress, 'otherwise he (the President) does not discharge his own constitutional duty of seeing that the laws be faithfully executed'. Even as regards inferior officers, where Congress has vested the right of appointment with the heads of departments, the power of removal may be vested by the same authority in the heads of departments. The Court had admitted that in the Perkins case. But that did not allow Congress to remove or participate in that removal power. When the power of Congress to vest the removal in the head of the department is not used, it belongs to the President. (And let us add, considering the balance of power, constitutional and political, in the President's Cabinet, even where the head of the department has this power it must be subject to the President's authority.) The court laid very emphatic weight upon the action of the First Congress, by reason of its membership and its proposal of the first ten amendments, which 'rounded out the constitution itself'.[2] Therefore, 'the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the constitution and invalid.' [3]

[1] This is really extraordinary doctrine and shows the wide discretion enjoyed by the Supreme Court.

[2] 'This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years fixes the construction to be given its provision' (175).

[3] We cannot ignore a minority which consisted of Justices Holmes, Reynolds and Brandeis. It is interesting to observe the attitude of the minority of the Court to this question. Very briefly summarized it is as follows: Congress has enacted numerous statutes 'prescribing restrictions on removals and by approving them many Presidents have affirmed its power therein'. Historical data and constitutional practice

(ii) **Legislative Leadership.** Armed with these formidable executive powers, and placed in a position where all expectations are, in the modern conditions of publicity and propaganda, concentrated upon him, how can and how does the President use his legislative powers? Many Presidents have used their Message and Veto Powers as the vehicle of legislative leadership. But there is no virtue in the vehicle itself: whether it shall be effective or not, depends entirely upon the state of mind of Congress, which means, more often, the state of parties, and when the President is not supported by a party majority in Congress, the message is no more than a manifesto to his party colleagues and a call to the country. Even when his party is in possession of Congress members may be slack, or hostile to the policy, and then, as under Roosevelt and Taft, the message may contain the ring of electoral and patronage doom, and cause a rally to the Presidential wishes. In England no Cabinet ever assumes the power to write a message until it has the power to embody the contents in law and administration: that is the essence of the Cabinet system. In the U.S.A. the message has validity upon two conditions only, that the President's party commands Congress, and that the President is able to walk in step with these colleagues, and the latter depends upon the reciprocal influence of personality, of mind, the seductions of patronage, and the desire to impress the country with the serviceability of the party. Under Wilson the message became a fertile source of policy, the banking system, the income tax, the control of trusts, were the subjects of important legislation, by the Federal Reserve Act, the Income Tax Act, the Clayton Act; while the Adamson Act embodied Wilson's solution of railway labour disputes, and the Overman Act effected administrative reorganization. The Underwood Tariff was driven through by Wilson. Under Taft the Tariff had been revised (the Payne-Aldrich Act, 1909) at his recommendation; similar successes were the creation of the Court of Commerce to hear appeals from the Interstate Commerce Commission,[1] the establishment of a post-office savings system, parcels-post, and, most importantly, the creation of the Economy and Efficiency Commission.[2] Several laws, too, were secured relating to the conservation of natural resources. Before Taft, Roosevelt had used his messages[3] not only to agitate his peculiar brand of Progressivism, but to initiate legislative and administrative policy: the Elkins Act of 1903 (to

for the last fifty-eight years make the consent of the Senate 'a condition of removal from statutory inferior, civil executive offices to which the appointment is made for a fixed term by the President with such consent'. The case cannot be decided by any inference from the character of Presidency outside the constitutional provisions (cf. 178–295).

[1] Abolished in 1913.

[2] Its findings and recommendations had a very beneficial effect upon American administration, especially in the creation of the Budget system.

[3] Cf. *Message*, 3 Dec. 1901.

control the policy of railway rebates), the Hepburn Act of 1906 (to amend the constitution and extend the power of the Interstate Commerce Commission), the Meat Inspection and Pure Food Laws of 1908, the Employers' Liability Act; the construction of the Panama Canal was begun, and the conservation of natural resources was energetically and wisely undertaken. Many other examples could be given of effective Presidential messages: more, however, could be given of ineffective ones. The Message power is undoubtedly an important factor in the President's prestige, resulting in an addition to his substantial powers of leadership. It concentrates attention upon the President, whether it is legislatively effective or not; and it rouses expectation in the people, for the majority do not know that the President's power is only one of information to Congress, and they are more likely than not to consider any opposition to him as factious and corrupt, for Congressmen have not a savoury reputation. Perhaps, on the whole, therefore, the practice of delivering the message in person before Congressmen is, in contemporary American conditions, to be preferred to the simple sending of the message to be read. Washington and Adams delivered their messages in person; but Jefferson sent his to be read by the Clerks of Congress. The latter practice was broken by President Wilson, whose views of the Presidency were that he should be a positive leader in government. His successors have continued the practice; Coolidge, indeed, whose furtive nature has caused him to be miscalled 'silent', having broadcast his message by wireless.

The Veto Power. If the message power is only a potentiality, the veto power is of real weight. We have already seen that it was intended as a defence of the Executive against the Legislature; but we know also that it was regarded as a positive legislative opportunity for the President. In practice, it has been used often; and its employment on grounds of expediency has been more frequent than for the defence of constitutionality. But the latter use came first in the history of the Republic. Until the end of Jackson's term there were twenty-one vetoes, and all but five or six were based upon constitutional grounds.[1] Thence until 1865 the number of vetoes out of expediency increased, but were still outnumbered by the others. From 1865 the vetoes have extensively increased in number, and the vetoes on constitutional grounds have been negligible in quantity. Mason says that 'it is a well-settled principle that a President is the sole judge of the nature of the reasons which shall be assigned for a veto'.[2] This means, in effect, that the President's veto power is now exempt from any limitation issuing from the avowed intention

[1] Cf. Mason, op. cit., p. 129.

[2] Ibid., p. 130; cf. Willoughby, *Constitutional Law of the United States*, Vol. II, para. 367.

of the Fathers that it should be his defence against legisla the encroachment.

How has the veto been used, and why has it come to be the instrument of expediency? Between 1789 and 1925 it was used about 600 times. About one-half of these vetoes were used against private pension bills and appropriations for internal improvements, a form of party and local spoliation particular to the United States. The others have concerned issues of policy. Until 1890 of 433 vetoes only twenty-nine were overridden by Congress. Since then Cleveland, Taft and Wilson suffered only two reversals, Harding none, Roosevelt none, and Coolidge five out of fifteen. This argues for a very substantial power of the President. Yet that is not all: for of the twenty-nine, fifteen were passed over the veto of President Johnson alone, when the country was still in a warlike state of mind and when Congress reflected that feeling. The varying numbers of vetoes in different Presidential terms, reflects two things: one, the steady development of Congressional business, and, secondly, the personal reactions of the man to the office. Washington vetoed two bills in eight years; for several terms there were no vetoes at all (under Jefferson, Madison, Van Buren and others). Since the Civil War they have been many [1] (with the exception of President Arthur's four). Until the time of Cleveland, seven Presidents had not used the veto power [2]; four were in harmonious relations with their parties; another, Jefferson, would not use the veto on republican grounds,[3] while the other three died after a short time in office. Nine Presidents vetoed few bills, of whom only Tyler seems to have passed from constitutional and expedient grounds to those of political malice and obstinacy. Five Presidents vetoed each twelve or more bills,[4] and these were men very strong in their conviction of Presidential power; indeed, they used not only the ordinary veto power, but the 'pocket' veto also. The pocket veto is the power of killing a bill which the President obtains. If Congress expires or adjourns before a bill has been in the President's hands ten days and he takes no action upon it, it silently dies. Numerous bills are, in fact, vetoed in this way; large numbers are rushed through Congress in the last days of a session, and it is only necessary for the President to pocket them to frustrate the intentions of Congress. This gives the President the opportunity of letting bills die without his being obliged to explain why to Congress.

[1] e.g. Cleveland, 358 (over 200 were Pension Bills); Roosevelt, 40; Taft, 30; Wilson, 26. The establishment of the Budget system, and other changes, cause the vetoes to become steadily less numerous.

[2] John Adams, Jefferson, John Quincy Adams, Van Buren, W. H. Harrison, Taylor, Garfield. Cf. Mason, op. cit., p. 126, footnote 2.

[3] 'Unless the President's mind, on a view of everything which is urged for and against the Bill, is tolerably clear that it is unauthorized by the Constitution—if the pro and con hang so even as to balance his judgement—a just respect for the wisdom of the legislature would naturally decide the balance in favour of their opinion.'

[4] Jackson, Johnson, Grant, Hayes, Cleveland.

The Positive Power of the Veto. Here is a power which costs no expenditure of effort, and which can be used with a fair prospect of success, and no punishment. A long and arduous legislative battle in the country and the legislature may be lost by any group of Congressmen in the time it takes to write 'No',[1] and a few phrases of explanation. It can only be overridden after reconsideration, and a two-thirds majority: and for these there is little chance, given the congested state of Congress, and the differences of party representation in the two Houses.

It would be no wonder if the veto power were not only discriminatory among bills already passed, but if it became an ever-present, if unuttered, threat to promoters of bills (unless they were quite certain of a two-thirds majority in the ultimate resort), and tended to become an instrument of bargaining for other legislation—an instrument to be propitiated by timely and obvious surrenders. This, indeed, has happened.[2]

Taft held the negative view of the Presidency, yet as regards the veto he supported its positive legislative character[3]; Wilson, as a student, held the veto power to be an effective instrument to stay the hand of Congress whenever the President's views of the public good differed seriously from those of Congress.[4] When he became President he used the veto with care and a profound sense of responsibility. His veto message of 1915 gives an interesting insight into the President's mind, and reproduces almost the theory of a 'veto for a referendum' argued by the British House of Lords as a justification for its own existence.[5]

Legislative Leadership? Out of these elements—electoral

[1] Art. I, Sect. 7, 2, regulates the procedure: '. . . if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it'. . . . Cf. Willoughby, Vol. II, para. 367.

[2] Cf. Munro, op. cit., p. 157; Beard, *American Government and Politics*, p. 211.

[3] Cf. Taft, *Our Chief Magistrate and his Powers*, pp. 16, 18: 'In the exercise of the veto power, the truth is that it often happens that the President more truly represents the entire country than does the majority vote of the two Houses.'

[4] Cf. Wilson, *Congressional Government* (1885), pp. 52, 260, where he stresses that, in the exercise of the veto, the President is powerful 'rather as a branch of the legislature than as the titular head of the Executive'. Cf. *Constitutional Government* (1908), pp. 59, 60, 73, 74, for a more elaborate discussion.

[5] Cf. *Cong. Rec.*, Vol. 52, pt. 3, pp. 2481–2. *To the House of Representatives*: '. . . If the people of this country have made up their minds to limit the number of immigrants by arbitrary tests and so reverse the policy of all the generations of Americans that have gone before them, it is their right to do so. I am their servant and have no license to stand in their way. But I do not believe that they have. I respectfully submit that no one can quote their mandate to that effect. Has any political party ever avowed a policy of restriction in this fundamental matter, gone to the country on it, and been commissioned to control its legislation? Does this bill rest upon the conscious and universal assent and desire of the American people? I doubt it. It is because I doubt it that I make bold to dissent from it. I am willing to abide by the verdict, but not until it has been rendered. Let the

prestige, party primacy, executive leadership, patronage, and the message and veto powers—Presidents have compounded an office for themselves which comes near to being that of governmental leadership, as that is possessed by the British Cabinet. For the exploitation of these things has enabled Presidents to acquire a positive legislative leadership, though it must be admitted it is intermittent, weak and precarious. Roosevelt, Taft and Wilson conspicuously bored into the precincts of Congress, and by all the arts of management pushed their suggestions to a legislative conclusion. They sent messages to the Houses, and letters to party friends; held conferences and breakfasts in their room adjoining the Senate, and invited the Chairmen of Committees and the 'floor leaders' to the White House.[1] Their most trusted and astute Cabinet officers were often sent to the Congressional lobbies to whip up support, and to exert the influence of personal representation of the President.[2] Heads of departments attended caucus meetings; information was poured into Congress; party friends were provided with drafts of bills and the vindicating briefs; while the departments were and are in the habit of sending

platforms of parties speak out upon this policy and the people pronounce their wish. The matter is too fundamental to be settled otherwise.

'I have no pride of opinion in this question. I am not foolish enough to profess to know the wishes and ideals of America better than the body of her chosen representatives know them. I only want instruction direct from those whose fortunes, with ours and all men's are involved.'

Cf. also Roosevelt's views in his article on *The Presidency*, written when he was Governor of New York (cited above): 'This power (the veto) is varyingly used by different Presidents, but it always exists, and must always be reckoned with by Congress' (p. 3).

It is clear, therefore, that the veto power is an important legislative function of the President. Stanwood says that Presidents offset their own judgement against that of Congress, etc., and the power tends to become absolute, for it is very difficult for Congress to find a two thirds majority in both Houses to overcome the veto.

Some thinkers are in favour of a reduction of the power of the President and an increase in that of Congress by a reduction of the two-thirds vote to a simple majority, but there are others who favour an increase of executive power, and these tend to the view that the power to veto items of a Bill should be granted the President as well as his present power which is confined only to the vetoing or acceptance of the whole Bill. Under the present system a President must often accept legislation which he thinks unwise but which is ensconced among other clauses which must be accepted. Cf. Taft, op. cit., p. 25, where it is pointed out that Congress adds riders by legislation to Appropriation Bills which must be accepted because they are essential to the continuance of government. Taft thinks that the partial veto would, however, give too much power to the President (p. 27).

[1] Cf. *Cong. Record*, 68th Cong., 2nd Sess., p. 2712, Longworth (Speaker): 'There must be teamwork, too, between Congress and the Executive, certainly if the Executive be a member of the majority party in Congress. I am by no means advocating that Congress should be a rubber stamp for the execution of the Executive will. I am utterly opposed to Executive domination of the legislative branch of the Government, just as I would be opposed to the legislative domination of the Executive, but that does not mean that a just balance between these two great constitutional branches cannot be preserved with both functioning in friendly co-operation.'

It may be noted at this point that the President's Message is distributed to the various Departments.

[2] Cf. Pepper, *In the Senate*.

projects to Committee Chairmen and of attending Committees to explain and advocate them. Further, communications to Congress in project form contrive to obtain priority of treatment. A special influence is exerted through the co-operation in appropriation when they are examined by Congressional Committees. Moreover, Congressmen often request the Departments to draft bills for them. The newspapers since 1900 have been full of examples of what we have said, are continuously comparing the attitude of the local Senator or Representatives with the wishes of the President. Hostile Congressmen not infrequently profess to be anxious for the Constitution should these practices develop,[1] while friendly Congressmen glory in their rôle,[2] and Presidents have acknowledged their power to overcome the theoretical separation of powers [3]; for the Presidents are America's most successful lobbyists. Nor is that all. There is no tradition or convention or constitutional rule that the President's name and views must not be used in debate. Hence, supporters are able to quote him at length: they quote from his messages, his speeches in the country, his writings, their own interpretation of his mind, and the letters they have in their pocket.

The Conditions of Presidential Success. There is no doubt that a determined and capable President may secure a leadership in legislative policy. But under what conditions? He must have a party majority in Congress; he must have a good public reputation; he must be able to thread his way through the mazes of the constitution. Under McKinley, Roosevelt, Taft, Wilson, all these conditions were present. Moreover, the condition of the people threw the reins of government into the hands of the President. For the period since 1895 has been in America, as in all other countries, one of rapid social reform, and the swift expansion of State activity. The Presidential election and Presidential policy are very obviously the trusted instru-

[1] Cf. *Cong. Rec.*, Vol. 42, pt. 1, pp. 268, 294–302 (Berdahl, *Readings*, pp. 185, 186); Beard, *Readings* (rev. ed., 1913), pp. 264–9; Reinsch, *Readings in American Government*, pp. 12, 185.

[2] Reinsch, op. cit., p. 60.

[3] Cf. Taft, *Our Chief Magistrate and his Powers*, pp. 11, 12: 'It is true that a parliamentary government offers an opportunity for greater effectiveness in that the same mind or minds control the executive and the legislative action, and the one can be closely suited to the other; whereas our President has no initiative in respect to legislation given him by law except that of mere recommendation, and no method of entering into the argument and discussion of the proposed legislation while pending in Congress, except that of a formal message or address.

'To one charged with the responsibilities of the President, especially when he has party pledges to perform, this seems a defect, but whatever I thought while in office, I am inclined now to think that the defect is more theoretical than actual. It usually happens that the party which is successful in electing a President is also successful in electing a Congress to sustain him. The natural party cohesion and loyalty, and a certain power and prestige which the President has when he enters office, make his first Congress one in which he can exercise much influence in the framing and passage of legislation to fulfil party promises.'

ments of change for the mass of people, for the President more than Congress embodied this idea of 'government', some one to look to, and from whom to expect deeds. Congress had reached the very depths of unsavoury reputation. Its manœuvres, its filibusters, its shameless seeking for jobs, the distrust of Senatorial class-representation, its muddling do-nothingness, caused people to turn from it to an alternative.[1] Further, for the term of his office, the President had come to be a party leader, because he was looked upon as a party leader. He was a prize for Congressmen, a factor in their pride, and a trophy and testimonial for them in their own electoral anxieties. Hence his activities had to be supported. To humiliate him was to humiliate themselves and the party, and perhaps to court defeat at the next elections. Taft has pointed out how inescapable is party leadership for the President:

'Under our system of politics the President is the head of the party which elected him, and cannot escape responsibility either for his own executive work or for the legislative policy of his party in both Houses. He is, under the constitution, himself a part of the legislature, in so far as he is called upon to oppose or disapprove acts of Congress. A President who took no interest in legislation, who sought to exercise no influence to formulate measures, who altogether ignored his responsibility as the head of the party for carrying out ante-election promises in the matter of new laws, would not be doing what is expected of him by the people. In the discharge of all his duties, executive or otherwise, he is bound to a certain extent to consult wishes, even the prejudices of the members of his party in both Houses, in order that there shall be secured a unity of action by which necessary progress may be made and needed measures adopted.'[2]

Responsibility, Personality, and Leadership. Now, in the passage cited from Taft, there occur the phrases 'escape responsibility', 'ignored his responsibility'. There is nothing in the constitution which imposes a 'responsibility' on the President; it knows nothing but duties. What then is the nature of this responsibility about which all Presidents have talked? They cannot be removed from office by Congress, except by impeachment in grave cases. But that is the extreme Congressional penalty, and to avoid it requires only that the President shall not be positively criminal in his behaviour. Nor can the people depose him until the four years' term has elapsed. It comes to this, then, that his 'responsibility' is a sense of duty compounded of the desire to make his office serviceable to the people, to win the approval of Congress, to secure the continued predominance of his party, and sometimes, to secure a second term of office. Some men may think this is best accomplished by a quiet recessiveness: others by resolute assertiveness. Some may place the continued

[1] Cf. Taft, *Our Chief Magistrate and his Powers*, p. 18: 'In the exercise of the veto power, the truth is that it often happens that the President more truly represents the entire country than does the majority vote of the two Houses.'

[2] *Four Aspects of Civic Duty*, p. 100.

office of the party above the other factors; others, like Roosevelt, may act so that the party splits asunder. I cannot think of any President who has specially planned his course to steer directly into a second term: party colleagues are usually ready to give this for their own electoral purposes. Nor has the President cared for Congressional approval above the realization of his own plans—the history of the veto (save in Jefferson's case) shows this.

Strong and Weak Presidents. The final fact remains that there is hardly any responsibility except to the President's own moral convictions. These have prompted action of very various kinds from different men. Had Hamilton been President he would have been an assertive President—holding that only his own sense of the moral should act as a binding force to his political activities. Washington would not brook the rôle of passive executor of Congressional orders [1].

Jefferson's purchase of Louisiana and his masterly steersmanship out of the course of war with either France or England, are examples of a positive theory of leadership. Further, both Washington and Jefferson virtually settled the convention that there should be no third-term Presidents—and this by a positive confrontation of the question, and not a mere apathetic acceptance of events.[2] Nor were Madison

[1] Cf. Lodge, *Life of Washington*, II.

[2] Cf. Farewell Address, 17 Sept. 1796, *Writings of George Washington* (Putnam), XIII, 277–81: 'The period for a new election of a Citizen, to administer the Executive Government of the United States, being not far distant, and the time actually arrived when your thoughts must be employed in designating the person, who is to be clothed with that important trust, it appears to me proper, especially as it may conduce to a more distinct expression of the public voice, that I should now apprise you of the resolution I have formed, to decline being considered among the number of those, out of whom a choice is to be made.

'I beg you . . . to do me the justice to be assured, that this resolution has not been taken without a strict regard to all the considerations appertaining to the relation, which binds a dutiful citizen to his country—and that, in withdrawing the tender of service which silence in my situation might imply, I am influenced by no diminution of zeal for your future interest, no deficiency of grateful respect for your past kindness; but act under (and) am supported by a full conviction that the step is compatible with both. . . .'

Cf. Letter to John Taylor, *Writings of Thomas Jefferson* (Putnam), VIII, 338–40: '. . . My opinion originally was that the President of the U.S. should have been elected for seven years, and for ever ineligible afterwards. I have since become sensible that seven years is too long to be irremovable, and that there should be a peaceable way of withdrawing a man in midway who is doing wrong. The service for eight years with a power to remove at the end of the first four, comes nearly to my principle as corrected by experience. And it is in adherence to that that I determined to withdraw at the end of my second term. The danger is that the indulgence and attachments of the people will keep a man in the Chair after he becomes a dotard, that re-election through life shall become habitual, and election for life follow that. Genl. Washington set the example of voluntary retirement after eight years. I shall follow it, and a few more precedents will oppose the obstacle of habit to any one after a while who shall endeavour to extend his term. Perhaps it may beget a disposition to establish it by an amendment of the constitution. I believe I am doing right, therefore, in pursuing my principle. I had determined to declare my intention, but I have consented to be silent on the opinion of friends, who think it best not to put a continuance out of my power in defiance of all circumstances. There is, however, but one circumstance which could engage my acquiescence in

and Monroe without personal force. The powers and opportunities of all these men were enhanced by the continual state of war. Jackson's name is a synonym for rough and successful imperiousness: his vigorous action regarding the United States Banks and his pronouncements to Congress on the occasion of his vetoes and the Senate's resolution of censure, show to what a small extent a wilful President can be restrained, at least where the Constitution is not unambiguously against him. Between Jackson and Lincoln the Presidents were weak men, and their constitutional doctrines as well as their actions expressed their weakness.[1] Lincoln's leadership needs no elaborate discussion:

another election, to wit, such a division about a successor as might bring in a Monarchist. But this circumstance is impossible. . . .'

In 1875 General Grant said that he 'would not accept a nomination if it were tendered, unless it should come under such circumstances as to make it an imperative duty,—circumstances not likely to arise'. These phrases were universally interpreted as implying willingness to accept a third term (cf. Stanwood, op. cit., I, 360). The movement received a death-blow by the resolution of a Democratic member from Illinois 'that, in the opinion of this House, the precedent established by Washington and other Presidents of the United States, in retiring from Presidential office after their second term, has become by universal concurrence, a part of our republican system of government, and that any departure from this time-honoured custom would be unwise, unpatriotic, and fraught with peril to our free institutions' (carried by 234 : 18; 70 out of the 88 Republicans voting in the affirmative, ibid., loc. cit.).

Cf. also Taft, *Our Chief Magistrate and his Powers*, p. 4: 'I am strongly inclined to the view that it would have been a wiser provision, as it was at one time voted in the Convention, to make the term of the President six or seven years, and render him ineligible thereafter. Such a change would give to the Executive greater courage and independence in the discharge of his duties. The absorbing and diverting interest taken in the re-election of the incumbent, taken by those Federal civil servants who regard their own tenure as dependent upon his, would disappear and the efficiency of administration in the last eighteen months of a term would be maintained.'

Roosevelt accepted nomination for a third term in 1912.

Cf. Theodore Roosevelt, *An Autobiography* (1913), p. 423: 'The Presidency is a great office, and the power of the President can be effectively used to secure a renomination, especially if the President has the support of certain great political and financial interests. It is for this reason, and this reason alone, that the wholesome principle of continuing in office, so long as he is willing to serve, an incumbent who has proved capable, is not applicable to the Presidency. Therefore, the American people have wisely established a custom against allowing any man to hold that office for more than two consecutive terms. But every shred of power which a President exercises while in office vanishes absolutely when he has once left office. An ex-President stands precisely in the position of any other private citizen, and has not one particle more power to secure a nomination or election than if he had never held the office at all—indeed he probably has less because of the very fact that he has held the office. Therefore the reasoning on which the anti-third term custom is based has no application whatever to anything except consecutive terms. As a barrier of precaution against more than two consecutive terms the custom embodies a valuable principle. Applied in any other way it becomes a mere formula, and like all formulas a potential source of mischievous confusion.'

[1] Cf. W. H. Harrison, *Inaugural Address*, 4 March 1841. [*Messages and Papers of the Presidents*, 1789–1897, IV, 5–21 (House Misc. Doc., 2nd Sess., 53rd Cong., Vol. 37)]: '. . . When the Constitution of the United States first came from the hands of the Convention which formed it, many of the sternest republicans of the day were alarmed at the extent of the power which had been granted to the Federal Government, and more particularly of that portion which had been assigned to the executive branch. There were in it features which appeared not to be in harmony with their ideas of a simple representative democracy or republic, and knowing the tendency

he was elected into indubitable leadership; and he succeeded. But his follower, Johnson, fell heir to all the difficulties of reconstruction; and then, for the first time, the full brunt of Congressional stultification was suffered by a President. He could not prevail, but he did not consider it proper to apologize for his very strong views, or retire when Congress so vindictively pursued him. He carried matters, indeed, so far, that Congress made use of its ultimate weapon against a daring executive: impeachment. This failed by a vote short of the necessary two-thirds of the Senate.

The Presidency suffered a period of recessiveness thenceforward to the time of Cleveland. Since that time the Presidents have not had power thrust upon them, but they have expressed the view that they ought to have it. Thus Cleveland,[1] and also McKinley.[2]

At about that time Bryce commented upon the weakness of the Presidency. He was not a party leader, he had little influence upon his party colleagues in Congress,[3] his message power was 'rather a manifesto, or declaration of opinion and policy, than a step towards legislation'.[4] He gave the palm to Congress, as having 'succeeded in occupying nearly all the ground which the constitution left debatable between the President and itself'.[5] Some years earlier the future President Wilson was meditating *Congressional Government* (written 1883-4), in which a different, and later triumphant, view of the Presidency was elaborated. This view was derived from contemplation of the defectiveness of Congress,[6] and though we cannot find it completely expressed in so many words, the tone of the argument is plain: it sings the virtues of a responsible, co-ordinating, and fertile Presidency:

'And there can be little doubt that, had the Presidential chair always been filled by men of commanding character, and of thorough political training, it would have continued to be a seat of the highest authority and consideration, the true centre of the federal structure, the real throne of administration, and the frequent source of policies.'[7]

These were words of hope, not of simple and academic regret! And in the Preface to the edition of 1900 there is evident pleasure:

of power to increase itself, particularly when exercised by a single individual, predictions were made that at no very remote period the Government would terminate in virtual monarchy. It would not become me to say that the fears of these patriots have been realized, but as I sincerely believe that the tendency of measures and of men's opinions for some years past has been in that direction, it is, I conceive, strictly proper that I should take this occasion to repeat the assurances I have heretofore given of my determination to arrest the progress of that tendency if it really exists and *restore the Government to its pristine health and vigour, as far as this can be* effected by any legitimate exercise of the power placed in my hands. . . .'

[1] Cf. Cleveland, *The Independence of the Executive.*

[2] Cf. Ogilvie, *Life and Speeches of McKinley* (1896).

[3] *American Commonwealth* (1st ed.), I, 206.

[4] Ibid., I, 53. [5] Ibid., I, 223.

[6] Bryce also foresaw the Renascence of the Presidency, and for the same reasons. Cf. ibid., II, 696.

[7] *Congressional Government*, p. 41.

'Much the most important change to be noticed is the result of the War with Spain upon the lodgement and exercise of power within our federal system: the greatly increased power and opportunity for constructive statesmanship given the President, by the plunge into international politics and into the administration of distant dependencies, which has been that War's most striking and momentous consequence. When foreign affairs play a prominent part in the politics and policy of a nation, its executive must of necessity be its guide, must utter every initial judgement, take every step of action, supply the information upon which it is to act, suggest, and in large measure control, its conduct. The President of the United States is now, as of course, at the front of affairs, as no President except Lincoln has been since the first quarter of the nineteenth century, when the foreign relations of the new nation had first to be adjusted. . . . It may be, too, that the new leadership of the Executive, inasmuch as it is likely to last, will have a very far-reaching effect upon our whole method of government. It may give the heads of the executive departments a new influence upon the action of Congress. It may bring about, as a consequence, an integration which will substitute statesmanship for government by mass meeting.'

Roosevelt was the first exponent and practitioner of what he himself called the 'Jackson-Lincoln theory' of the Presidency, namely, that

'occasionally great national crises arise which call for immediate and vigorous executive action, and that, in such cases it is the duty of the President to act upon the theory that he is the steward of the people, and that the proper attitude for him to take is that he is bound to assume that he has the legal right to do whatever the needs of the people demand, unless the Constitution or the laws explicitly forbid him to do it'.[1]

This was Roosevelt's comment upon his action to settle the anthracite coal strike of 1902. But all of Roosevelt's term of the Presidency was one long crisis of this kind, and he avowedly took the line that he and his officers could do anything which the Constitution did not *explicitly forbid*.[2]

Taft had a cautious mind and disposition, together with a slightly cynical urbanity: 'Real progress in government must be by slow stages', and 'the danger to the best interests of the country, is in the overwhelming mass of ill-digested legislation.'[3] His view of the Presidency, therefore, was that advantage to the country would come rather from good administration than more laws. There is no doubt, that by the date when he wrote his small but significant work, he was sufficiently nauseated by the personality of his former friend and supporter, Roosevelt.[4] The view is therefore expressed that the

[1] *Autobiography*, p. 504.

[2] Cf. ibid., p. 395: 'The course I followed, of regarding the executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service, was substantially the course followed by both Andrew Jackson and Abraham Lincoln.'

[3] *Our Chief Magistrate and his Powers*, p. 12.

[4] This is particularly borne out by Taft's parable of Mary apropos of Roosevelt's putting himself in the Lincoln class of Presidents. Cf. Taft's views, ibid., pp. 139–44.

President ought only to do that 'which can fairly and reasonably be traced to some specific grant of power, or justly implied and induced within such express grant as proper and necessary to its exercise'. But Taft admitted he could not avoid leading his party, and indeed, he led it in Congress as well as in administration. Nor should we forget that in 1926, when delivering the opinion of the Supreme Court in *Myers v. United States*, his doctrines of the Presidential right to create leadership had very much changed, and he had moved towards a position almost if not quite Rooseveltian.

Under Harding and Coolidge [1] Presidential power receded, for the one was the puppet of the Senate, and the other, who arrived at the Presidency by a series of accidents only possible in the American Constitution, could silently intrigue but not openly manage and command, while his personality seems to have repelled both Congress and the people, so that his own party delighted to thwart him.

Other Incidents of Leadership. The President has been able to add to his prestige, and to cast Congress into the shadow by his relations with the Press. He contrives to get the Press informed through friends, and of recent years through regular Press audiences twice a week. This is a telling advertisement for the President. He is enabled not merely to take the lead in legislative policy and to set the people against Congress and in his own favour, but by uttering opinions within the range of interest of the social and correspondence columns of the London *Daily Mirror*, and the American Sunday Supplements, to win the confidence of the people.

The fact is that the President is the nearest and dearest substitute for a royal idol which the Americans possess, and much of the pateless snobbery which in Europe has so long invested royal actions with a blinding halo has in the U.S.A. affixed itself to the Presidency. The President has days when he is prepared to shake anybody's hand (Coolidge puts his record at 'nineteen hundred in thirty-four minutes'), and these are the days when thousands, protesting their republicanism, fall over each other and swoon in their efforts to reach the President. The phrase 'The First Lady of the Land', as the wife of the President is called, already indicates the growth of useful snobbery. All this accrues to the President.

IMPLICATIONS AND JUDGEMENT

In America, as everywhere, there is governmental leadership, for leadership can never be utterly destroyed. Denied a free expression in one institution, it moves like quicksilver to another; and even when it is dispersed, the moment the forces of society incline the board in one direction, the globules swiftly run together at a

[1] Cf. Coolidge, *Autobiography* (1929), Chap VI, 'Some of the Duties of the President'.

single point. In the United States, leadership was intentionally dismembered and dispersed. But new demands, an organized and Press-ridden electorate, the party system, masterful men, and half-willing, half-unwilling Congressional readiness and need for leadership, have joined in placing governmental leadership in the President. Yet it is not a leadership such as one observes in the British Cabinet system; it has none of its advantages, and is rich in defects, serving the country badly. For it is leadership uncertain in the scope of its power, which is entirely dependent upon a number of disparate and often inharmonious elements and unpropitious circumstances. No way has yet been discovered to make them all march in preordained harmony and hierarchy. It is a leadership which declares itself responsible, but in which the expectation of responsibility is not unwavering, nor perfect in its centrality. To the people it makes promises and explanations, but there is no sanction whereby the people can conveniently and certainly bring home a punishment to the perfidious or stupid. Congress which lives by its side commences with but a small and unreliable guarantee of co-operative thought with the President, and there is always the possibility of a sudden political antagonism to be added to that of personal antagonism, should the mid-term elections produce a Congressional change of party strength.

Moreover, even where leadership has surmounted these obstacles, it has still to seek contact with the law-making body by sometimes unsavoury, but necessary means, and must always labour lamely and suspiciously for that injection of administrative expertness into the ingredients of the law, which is so vital to the well-being of the ministrant and complex State. The Executive may have ingratiated itself with Congress: but it never, therefore, receives the plenitude of legislative leadership: that is always shared with the Chairmen of Committees, the Floor Leaders, and the Speakers. No single mind, whether of one magistrate or a compact body of close colleagues, ever reviews the legislation of Congress, and puts the items together in their sequence of time, and their proportional social importance. There is an almost unregulated spate from different taps. . . . Even that is not all. For whereas the British Cabinet system, built soundly and vitally in the loins of the party system, secures some preparation for office, for constructive leadership in national politics, there is little opportunity in the American system for such *selective* preparation. Nor does the term of office hang upon the quality of its use; for the constitution sets the term at four years, republican sentiment has rejected twelve years, while a second term is not the inevitable reward of good stewardship (as in Taft's case), nor its refusal, or the first term's curtailment, the punishment for improper leadership. It is of no validity, in a judgement of the system, to retort that in the

British system, another party may take office at the end of four years: for the party whose leaders do take office are people who have already held an office of state in which the development of government has been continuously watched and influenced by them: they have held the office of Opposition. As such they have not been excluded from government, but have co-operated with it, exercising authority, but from a slightly different angle. Many Presidents have come unlearned, and have left before their shortcomings were fully made up. So also with the Cabinet Ministers to whom we shall turn in a moment.

Yet the prime and most regrettable defect in American executive leadership is that—America has no Opposition. But it will be urged that the party defeated in the Presidential election still has members in Congress and a programme which was made at its National Convention. This is true. Yet the energies of the American people seem to be exhausted once the President has been elected; the candidate of a party, he seems to be transformed suddenly into the elect of the whole people. While the forces of the successful party live in a concentrated existence for the next four years, braced by the ligatures of the Constitution, invigorated by deep draughts of power and patronage, and continuously *personified*, the Opposition is unblessed by the Constitution, it has lost its personal hope, it is dispersed in two Houses which may be at loggerheads with each other, and its national party organization has ceased to function with the intensity and unified strength of the campaign months. It may demand information, but the President may refuse to give it, and though, indeed, the national practice, where men desire the harmonious action of institution, is to give such information, so long as it is not really dangerous to public interests, there are not those frequent opportunities for questioning and critical debate which we find in the Cabinet system, nor the Parliamentary right to compel the production of papers and documents. The right to question the Executive is more on sufferance in the U.S.A. than in England. The American Executive is fully guarded from surprises, ambuscades and cross-examination. The Constitution has not expressly banned it from the floor of Congress: it has suffered itself to be banned and to operate in seclusion, one mile away, at the other end of Pennsylvania Avenue. It has, personally, little to gain, and much to suffer, by meeting those vociferous, garrulous, suspicious men in the Capitol. When it is in the majority in Congress it is almost unquestioned, for then even the Congressional investigations desired by the opposition will not be permitted. In Britain there is enough common ground recognized between all parties to permit, and even to encourage, the Opposition's request for debate. The Senate is freer to debate executive behaviour than the House of Representatives. However, the non-acknowledgement, due partly

to the absence of a concerted and continuous Opposition, results in its substitutes acting bitterly, spitefully and factiously, like all pretenders who are uneasy about their public status. Of course, against such investigations, the leadership defends itself by all means, and in cases short of the Fall-Denby oil scandals, its defence is believed more than the revelations.

The Separation of Powers and the Cabinet. Naturally, the cause of this intolerably bad system is the division of powers. The system has gradually grown up to overcome that arrangement, and it has gone a long way towards success, considering the many obstacles. All the friction, all the waste of effort; all the losses in terms of ill-considered and badly-co-ordinated laws; all the unweeded and harmful growths in administrative practice, the irresponsiveness to national needs,—all come directly from the obstinately held constitutional dogma. There cannot be any lasting gain until the separation of powers is abandoned.

There have been suggestions to abandon it in part, and they have been made in relation to the President and his Cabinet. It was impossible for the President even in the primitive days of the early eighteenth century to be at his work always, and to carry out the executive work of every branch of government. Hence, 'heads of departments' were established. Further, they were intended to act as advisers, severally or jointly. The difficulties of the tasks and the weight of responsibility caused Washington to turn to the heads of departments as the usual body of advisers, for the Senate gave him no help on treaty matters, and the Supreme Court would give no legal advice. From 1793 the term 'Cabinet' became current.

Now the Cabinet is composed of the heads of departments. These are appointed by the President with the confirmation of the Senate. These men are so obviously the personal assistants of the President that it would be not merely a deplorably ungraceful action of the Senate to refuse a man his own choice in such a matter, but it would lead, if the matter concerned sufficient members, to a breakdown of government. Refusals on the part of the Senate have been rare. In the whole history of the Republic only five such instances are discoverable, and four of these can be ascribed to occasions of abnormally strained relations between the President and the Legislature,[1] and the other, partly, to a desire to humiliate the President, and, partly, because it was considered that the candidate was really unfit for the office, that of Attorney-General.[2] On occasion the Congress has recommended the removal of certain Cabinet officers—thus, notably, in the

[1] Jackson, Tyler, Johnson, Coolidge (Warren was twice rejected).

[2] Cf. Debate in the Senate on the nomination of C. B. Warren as Attorney-General (*Cong. Rec.*, 69th Cong., Spec. Sess., Vol. 67, Pt. I, p. 256) (Senator Borah): '. . . In this instance before us he has only the power to nominate, and the question arises, What are the duties of a Senator and what is the duty of the Senate in case a Senator

case of Denby, involved in the oil scandals. But, substantially, the President alone appoints, controls, and removes the officers of the Cabinet. Although their departmental sphere of executive duties is prescribed by the law creating the office, the extent of their authority in council and the reliance of the President upon them, is decided by the President alone. For these Secretaries are isolated from Congress; they have no effective and compelling followers there; nor are they forced upon the President as a result of independent popularity and position of leadership won in the legislature or in the electorate, as happens in the British Cabinet system. They bear responsibility for their department only, and that responsibility is not the political responsibility of the British system, but criminal responsibility which abuts in impeachment. The sole responsibility for collective decisions is the President's.[1] Hence, the settlement of any policy does not follow, unless the President wishes it, by majority vote. Lincoln is said to have rejected the votes of the whole Cabinet against him with the remark that he was in the majority.[2] The part played by the various members of the Cabinet is therefore a consequence of their personal force, and some have been nearly as powerful as the President: Hamilton and Washington, for example, Chase and Seward in Lincoln's Cabinet, Hay and Root in McKinley's, and Hoover in Coolidge's administration. But a Cabinet Minister has no appeal against a President who does not want him any longer. He may be the better man, but the President is not therefore restrained by the thought, as the Prime Minister in Britain is restrained, that Parliament or the people will be shocked at a dismissal. The most unjust dismissal need not cause the President to fear for his position, especially in his second term. Presidents are therefore apt to be tyrannical or indifferent. In such a system one cannot expect to find more than one or two really good men in an administration. There is not the

or a majority of the Senate have fairly and honestly reached the conclusion that they should not advise and consent?

'Is the obligation which rests upon it merely a perfunctory one? Is not the obligation a most exacting one? Have we not a full share, and an inescapable share, of the responsibility for a strong, a clean, and a patriotic Government?'

[1] Cf. Taft, *Our Chief Magistrate and his Powers*, p. 30: 'The Cabinet is a mere creation of the President's will. It is an extra-statutory and extra-constitutional body. It exists only by custom. If the President desired to dispense with it, he could do so. As it is, the custom is for the Cabinet to meet twice a week, and for the President to submit to its members questions upon which he thinks he needs their advice, and for the members to bring up such matters in their respective departments as they deem appropriate for Cabinet conference and general discussion.'

[2] Cf. also Jefferson's discussion of Washington's administration.

Taft, ibid., p. 36: 'During the administration of our first President, his Cabinet of four members were equally divided by as marked an opposition of principle as monarchism and republicanism could bring into conflict. Had that Cabinet been a directory, like positive and negative quantities in algebra, the opposing wills would have balanced each other and produced a state of absolute inaction. But the President heard with calmness the opinions and reasons of each, decided the course to be pursued, and kept the government steadily in it, unaffected by the agitation.'

independence to attract the best men. The current dictum that the Cabinet officers are merely 'clerks' of the Executive is not attractive in a country where it is so easy to become a powerful and wealthy business 'executive'. Further, the fact that the Cabinet officers have no common mandate from the people or their party, puts a premium on domestic squabbles. Nor is the President spared.

President and Cabinet are isolated from Congress save for their excursions to its purlieus to press their measures, and the return visits they receive from Congressmen. Their exile is decreed by the Constitution, but not expressly, merely by implication, for the Constitution merely excludes from being 'a member of either House during his continuance of office', 'any person holding any office under the United States'. Attendance on the floor of Congress, participation in the debates of the House and in Committee would, in fact, not constitute 'membership' of the House. This was seen by Alexander Hamilton when Secretary of the Treasury under Washington, but the jealousy of Congress caused him to stay away from debate,[1] and merely to submit, instead of making, a report. From that time a convention has persisted that Cabinet members have no place on the floor of the House. It is only a convention, but a strong one, and it is founded upon the theory of the separation of powers, and the aping of the Place Acts, whose British inventors were not foolish enough to allow them to become obstructions to good government. Were the convention to change, Congressional procedure could admit the Cabinet officers to Congress: after all, the Attorney-General and other Chiefs of Departments already appear before Congressional Committees to answer questions and give information.

Of recent years the spectacle of the Congress panting for the breath of executive information, and the President and the Cabinet labouring wastefully to influence the source of legislative sanction, has prompted the suggestion that Cabinet officers should meet Congress openly. The matter was indeed made the subject of an official report as far back as 1864.[2] Again in 1881 the Senate reported in favour of the appearance in debate of the Cabinet officers, and they urged the reform not only on the ground of its direct usefulness in legislation, but because it would cause the appointment of men of larger governmental calibre than the existing system required or produced, thus:

'This system will require the selection of the strongest men to the heads of departments and will require them to be well-equipped with the knowledge of their offices. It will also require the strongest men to be the leaders of Congress and participate in debate. It will bring these strong men in contact, perhaps into conflict, to advance the public weal, and thus stimulate their abilities, and their efforts, and will thus assuredly result to the good of the country.'[3]

[1] Cf. Ford, *The Rise and Growth of American Politics* (1898), p. 87.
[2] See Vol. I, Cttee. Reports, H.R., 38th Cong., 6 April 1864.
[3] 4 Feb. 1881, Cttee. of Senate, 46th Cong., 3rd Sess., 1881, No. 837.

Anybody, indeed, who has served upon a public body, and is wise enough to see, and honest enough to admit, the sources of inspiration, will agree that one of the most valuable parts of the parliamentary system is that it offers an incomparable method of reciprocal stimulation, even as between opponents. Wilson looked towards such a system; and Taft actually proposed its introduction in his annual Message of 1912.[1] The view is held that the necessity of appearing on the floor of Congress would cause a more careful choice of Cabinet officers.[2]

Yet the scheme hangs fire, for there is a large weight of prejudice, academic and sentimental, against it, and an insufficiency of obvious quantitative proofs of its utility. If this step were taken it would be a very obvious demonstration that the Constitutional arrangements of the Fathers had indeed broken down, and people are frightened of what lies beyond.

Thus, still, the Presidential System is markedly different from the British Cabinet System. The form of its unity, the nature of its responsibility, the character of its connexion with the Legislature, and its place in the scheme of political parties, all mark it off strictly from the latter. We think that it is defective in the qualities necessary to constructive statesmanship of the kind demanded by modern material and spiritual conditions. The three things which permit its continuance, are the formidable ones of fear of large changes by open and direct means in institutions which have become such intimate parts of social life; the widespread ignorance of the nature of government even among Congressmen, whose selfishness also causes them jealously to grasp power; and, thirdly, the limited range of Federal authority, for this, were it to be legally permitted and politically required to act more comprehensively, and with profounder effect, would knock too sharply against the checks and balances of the Constitution for them to be assured of lengthy survival.

[1] Cf. op. cit., p. 32. His view put in his work on the Presidency was that besides causing the President to search for men with legislative experience, 'It would stimulate the head of each department by the fear of public and direct inquiry into a more thorough familiarity with the actual operations of his department and into a closer supervision of its business. On the other hand, it would give the President what he ought to have, some direct initiative in legislation and an opportunity through the presence of his competent representatives in Congress to keep each House advised of the facts in the actual operation of the government. The time lost in Congress over useless discussion of issues that might be disposed of by a single statement from the head of the department, no one can appreciate unless he has filled such a place' (ibid., pp. 31, 32).

[2] Cf. Black, *The Relation of the Executive Power to Legislation* (1919), p. 93; McCall, *The Business of Congress*, pp. 195, 196.

For further views on this question, cf. Orth, 'Presidential Leadership,' *Yale Review*, April, 1921; Macdonald, *New Constitution for a New America* (1921); Rowell, 'The Next Step in Washington,' *World's Work*, Dec., 1924–March, 1925.

CHAPTER XXIV

THE FRENCH CABINET

IN France the effective Executive is, as in England and Germany, the direct issue of the Parties as in Parliament assembled. The Chief of State, the President of the Republic, is more than a figurehead, but not much more. The brunt of government is borne by the Cabinet, or, as it is called in France, the *Conseil des Ministres*. As we have already seen in the case of England and the U.S.A., the efficiency of the Executive is governed by the combined effect of its legal power, its conventional attributes, and its composition.

Cabinet government based fully upon Parliamentary consent came only in 1875, with the simultaneous institution of Ministerial responsibility to the Chambers and the establishment of a non-hereditary Chief of State, elected by the Chambers for a short term. The Constitutional Laws of the Republic provide (1) that every action of the President of the Republic must be counter-signed by a Minister,[1] (2) that 'Ministers are collectively responsible before the Chambers for the general policy of the government, and individually for their personal acts',[2] (3) that 'the President of the Republic is not responsible for anything except in the case of high treason',[3] (4) that 'the President of the Republic communicates with the Chambers by messages which are read at the tribune by a Minister',[4] (5) that 'Ministers have the entry to both Chambers and may speak when they wish to', and they may make use of the assistance of commissioners designated, for the discussion of a specific project of law, by decree of the President of the Republic;[5] and, finally (6) that a law declared urgent by both Chambers must at once be promulgated, but that within the normal time before promulgation, that is, within the course of the month following the transmission of the law to him, he may require a parliamentary re-deliberation of the law.[6]

Responsibility. The Constitutional Laws of 1875 were the first since the Revolution to make clear that the responsibility of Ministers meant principally *political* responsibility. Previous constitutional law and theory had not clearly distinguished between penal and political responsibility, nor had the former been decisively relegated

[1] Law of 25 Feb. 1875, Art. III. [2] Ibid., Art. VI. [3] Ibid.
[4] Law of 16 July 1875, Art. VI. [5] Ibid. [6] Ibid., Art. VII.

as a minor and rare incident of office.[1] What, then, does political responsibility mean? As in England it means nothing more than that where the matter is sufficiently serious a Minister will be refused the power to pursue a political career, because the Chambers will withdraw their confidence and the electorate may not return him. The attempt to find a more precise meaning has failed, although the Chamber of Deputies once attempted to invest it with serious meaning.[2] The result has been a relationship between the Government and the Chambers of a rather unsettled nature. Pierre says it means that the Government must hide nothing from the Chambers, that these have a continuous right to control and modify its policy and administrative activity. He does not, however, think that the Cabinet should fall, whenever one or some, or all, Ministers displease the Chambers. 'The question of confidence, which is distinct from that of responsibility, does not arise unless the Government considers that it would be dangerous not to attempt to make its own will prevail.' This is only the French equivalent for the English insistence that the Government need resign only on vital matters. Pierre says that the Minister ought to stay in office unless he has been directly and gravely denied, but until that point has been reached, an adverse vote should be followed by bending, but not breaking. He is constrained (by events, I am sure) to admit that the principle of collective responsibility as it operates in France does not preclude a Cabinet from permitting one of its members from speaking and voting in a sense different from that held officially by the Cabinet. Thus in 1904, Combes, President of the Council, explained to the Chamber that there was nothing wrong in a difference of opinion between two Ministers:

'I do not think', he said, 'that it is to be imagined that *x* and *y* in consenting to join the same Cabinet thereby repudiated their life-long doctrines.

[1] Cf. Duguit, op. cit., II, and Pierre, op. cit., Vol. I, para. 105, e.g. The Constitution of 1848 provided, 'In all cases of ministerial responsibility, the National Assembly can, according to circumstances, send the inculpated minister either before the high court of justice or before the ordinary courts for civil compensation.'

The Constitution of 1852 abolished ministerial solidarity and provided for responsibility to the Chief of State only.

[2] See Pierre, Vol. I, para. 107. In 1881 the Minister of Public Works calculated that two and a half million francs would suffice for the building of the Court of Accounts. Ultimately eleven million were spent. When a supplementary credit was asked for, the Commission of the Budget refused it, and asked the question whether the Minister was not 'responsible' by the Constitution and according to the civil code *re* agency. The matter dragged on with learned arguments on all sides; but the upshot was that no one could suggest a competent court and an appropriate judgement. On all sides it was agreed that a law was needed to define political responsibility. Projects were submitted in 1883 (*J. Off. Doc. Chambre*, p. 949) and again in 1894, 1897, 1903; and in 1922 a law (10 August) was actually passed forbidding ministers and under-secretaries consciously to undertake expenditure, on pain of 'forfeiture', i.e. 'civil degradation' (according to Art. 167 of the Penal Code). This matter presumably would come before the ordinary criminal courts or the Senate (cf. Duguit, IV, 874 ff.). Apparently, also, the culprit is liable to surcharge for the amount thus spent.

The Cabinet does not pretend to realize an absolute homogeneity. . . . It pretends to reflect very exactly the republican majority of this assembly composed of four groups each of which professes divergent opinion on certain points.'

That is almost the exact opposite of responsibility as it is known in the British system; for there it is pretended that unanimity exists, and the pretence is founded upon a reasonable expectation that men of one party, though of different shades of opinion, may by lifelong co-operation and mutual loyalty arrive at the unanimity and common will of a compromise.[1] We shall see that in France certain conditions make this presumption quite impossible, and that, in fact, political practice has virtually deleted the words 'collectively responsible' from the Constitution.

However dubious, in fact, the meaning of responsibility, the Constitutional Laws thus concentrate, without ambiguity, the power and responsibility of government in the Ministers. The President appoints and dismisses them as an incident of his power to appoint and dismiss civil and military officials.[2] The question now is, what conditions have governed the operation of these clauses? Four stand out in the highest relief: the Cabinet has no power to dissolve Parliament; the Chambers are composed of a multiplicity of groups; the Senate demands Ministerial attention since it may trouble, if not overthrow, a Cabinet; and the Commissions are rivals of Ministers. We must now examine what these conditions imply.

No Cabinet Power to Dissolve. The President of the Republic was given by the Constitution the power to dissolve the Chambers, before the expiry of their legal term, providing he could obtain the assent of the Senate to such a policy.[3] This article was dictated by the Monarchists' desire to secure a strong, if not a monarchical government, and to make the President and the Senate forceful counter-agents to universal suffrage and the Chamber of Deputies, while the Republicans saw in the Senate a check upon the arbitrary use of the power of dissolution by the Executive. But the first attempt to use this machinery, on the 16th May 1877, by the Royalist President, MacMahon, was so indubitably against the contemporary sentiment of the country, that it has never been repeated. Nor is that all. Parliamentarists were able to persuade the electorate and, of course, themselves, that the power of dissolution ought not to be used. The

[1] Cf. Bagehot, *The Character of Sir Robert Peel* (1856), *Works* (Longmans, 1915), II.

[2] Law of 25 Feb. 1875, Art. III, Sect. 4. Cf. Esmein (*Éléments de Droit Constitutionnel* (7th ed., 1921), II, 208 *ff.*), who remarks that the Constitution of 1848 and the Laws of 17 Feb. and 31 Aug. 1871 expressly gave the President the power of appointment and dismissal of Ministers. He considers that the power is included in Art. III (cited above) and that consequently Ministers are not merely 'délégués du Président' but 'fonctionnaires de l'État'. Hauriou, *Précis de Droit Constitutionnel* (1923), p. 460, also considers the power is obtained from this article. Duguit (*Traité de Droit Constitutionnel*, IV, 820) is of the same opinion.

[3] Law of 25 Feb. 1875, Art. V.

motive of the Deputies is obvious; they wish to retain their seats as long as possible, and to act against any Government, as they wish, with electoral impunity, and they are able to sustain this desire by the argument that the Chambers represent the sovereignty of the nation, and this again is sustainable by mere reference to the Seize-Mai, which has produced the habit of regarding dissolution as a *coup d'état*.[1] The possibility of dissolution is never mentioned in normal times: it is no more than hinted at as a faint possibility—rather a fancy- when the incompetent turbulence of the Chambers is plainly bringing government not only to a dangerous pass, but into contempt. (It receives however increasing favour from the parties of the Extreme Right.) Let it then be understood that no power of dissolution exists in France. The Chamber of Deputies always lasts its full legal term—four years. The Government of the day has no weapon with which to ward off onslaughts, or to attack and disperse a parliamentary conspiracy, even the most factious. The political effects are dire. As factiousness cannot be subjugated, sovereignty is thrown into the hands of any group, however small, which any time possesses the balance of power. Two or three men in a key group may decide the fate of a Ministry, and even if they do not possess the power to overthrow the Government, they may easily possess the power of throwing it into a state of fearful anxiety, and of dictating vital changes in its programme. Thus, the Government has no power of defence or retribution. That is a serious evil, for it means that the value of its technical counsel is wasted for Parliament and the country. It may be compelled to relinquish its informed policy for the unsifted inspiration of a small knot of wilful men.

That is not all. For the Cabinet has no power to force these opponents to measure their own desires for office, their personal distinction, their joy of unmeasured criticism and lust of domination,-their 'carnal imagination' as Cromwell called it (when he distinguished between considered conviction and the satisfaction of personal appetites)—against the damage these might do to the people. There is no way of recalling the Deputies to a sense of their trusteeship and of compelling a close scrutiny of its terms. The criterion of judgement in a contest becomes intra-parliamentary and ceases to be at all popular. The groups are isolated in Parliament and are not recallable to the fact that they ought continually to listen to the voice of the people. French political crises are not national; they are personal, parliamentary and Cabinet crises. But the effects of the crises are deadly. They fill the Deputies with a sense of power, encourage the headstrong; and only when a long accumulation of legislative, executive and financial mistakes has disgusted the country

[1] Cf. Bodley, *France* (rev. ed., 1907), pp. 230, 231; Barthélemy, *The Government of France*; Siegfried, *Tableau des Partis Politiques*.

and brought it within sight of domestic ruin and international disrepute, can the Cabinet prevail, by threats and imagery of the dire results, upon the groups to accept its version of the national necessities.

The Groups and the Cabinet. Since the Cabinet has no power to compel a group to choose between it and a contest before the people, while the groups have full power to undermine and overthrow a government, there is everything to encourage the formation of groups. For even to command ten or fifteen votes is to become an arbiter of the fate of governments, and to become 'ministrable'. It is for this reason, quite as much as out of any intellectual honesty, that France has so many groups. There is nothing to check the transformation of a caprice, as well as a sound intellectual doubt, into a new party.

There are many groups. In the Parliament of 1924–8 there were ten groups, and thirty-one members belonging to no group. No group has ever secured a majority of the Chamber; none of such a size has ever gone to the country as one body with a co-ordinated policy which it was prepared to carry into effect should it receive a majority of suffrages,[1] even the *bloc national* of 1919, although kept together by the cohesive force of national reconstruction and vengeance, fell into pieces. Hence every government has been a coalition.

The Terms of Coalition. The initiative in its formation must be and is taken by the President of the Republic. He has obviously a number of choices—the Chamber of 1928, for example, contained three possible majorities—and even apart from considerations of policy, which have always moved Presidents in their approach to a Ministry, personal preferences also have some weight, as with Poincaré and Clemenceau. But he is concerned to find a practicable government, and his principal anxiety is to discover the basis of a working majority, even if it should not be that which would best meet his own policy. With this intention he confers first with the President of the Chamber and the Senate. This custom began with MacMahon, who actually offered the formation of a Cabinet to the Presidents, on the assumption that since they had been elected to their pre-eminent position by parliamentary majorities, they would naturally be able to form a Ministry. They refused, but on several occasions the President of the Chamber of Deputies has become Prime Minister. The suggestions of the Presidents are translated into offers made to various party leaders, and in some cases, to certain outstanding men who belong to no party at all, to form a government. These leaders, who are often without any organized party following,[2] consult with friends to discover where the greatest strength compatible with the longest time in office is to be sought: is it entirely on the Left, or

[1] Cf. the outline of parties and groups as given in Chap XV, *supra*.

[2] E.g. in 1914 Briand was not inscribed in any group; in 1919 Millerand was a *sauvage*.

will it be among the Moderate groups, or must an attempt be made to induce a Right group to co-operate with the Moderate Left? The Chairmen of the Foreign Affairs and Finance Commissions are consulted by the President and the *aspirant* Prime Minister, to give light, and sometimes weight, to their quest. Then the groups are approached. These are not usually engaged by their leaders, but hold a meeting to determine their attitude. They have various things to consider: whether they wish to serve with this particular *person* at their head, whether, accepting his person, they can accept the policy, whether, accepting these, they can co-operate with the other groups of the 'combination', and further, whether the number and importance of the Ministries and Under-Secretaryships are satisfactory. One section —the Socialist Party—never accepts office, but it is asked for its engagement to vote with the Government, or to abstain on certain occasions, in return for hostages of policy.[1] Nor is this all: the creator of the Cabinet is careful to include as few small groups as possible, for the larger the number of included groups the greater the compromise on principle, and the larger the number of joints the greater the fear and prospect of fissure.

Now, if two conditions were present the 'concentration' Cabinet, or the *combinaison*, as it is called, would suffice, and live a long time compared with their actual length of life. The conditions are, first, that the groups should enter the combination as one man, and secondly, that they should remain faithful to the combination.[2] Neither of these conditions exists, and neither can exist. The first does not and cannot exist, because every group contains dissentients, who will not follow their leader's person or policy, or who seek their own advancement by the overthrow of one Ministry, hoping that the formation of a new one will find them more favourably placed to dominate or command office. The fact is that the conventions of party loyalty are not accepted in France, as they are in England, owing to the inability of the Deputy to subject himself and his special convictions to public policy as interpreted by common consent. There is no way to force him into a state of discipline since dissolution is impossible: hence Jack can always find an argument to prove that he is as good as his master. Nor does the vote of the group, whether it be unanimous or split, reveal the true state of mind of the groups: nor does it afford a guarantee that in other circumstances the conditions of to-day will

[1] Cf. Maurice Privat, *Les Heures d'André Tardieu* (1930), for an excellent analysis of the various changes of Government in 1929–30. Cf. also for the relationship between Radical Socialists and Socialists, Herriot, *Pourquoi je suis Radical Socialist*. Cf. also Suarez, *De Poincaré à Poincaré*, and Marcellin, *Les Politiciens* (4 vols.) and *Voyage autour de la Chambre*.

[2] Cf. *Le Temps*, 30 Jan. 1904, with regard to the difference of opinion in the Cabinet: 'The Cabinet was formed on a definite programme upon the various parts of which there was accord between the Ministers. Other questions were reserved. . . .'

be accepted by the same number. It is a fact well known, also, in all parliaments, that men rise by intransigent opposition, while when they follow the Government they are expected to be silent.

Nor is the coalescing part of the group to be relied upon for long. The full difficulties of a programme cannot possibly be adumbrated in the few days of Cabinet-making, and as soon as they become patent in the course of Cabinet discussion, the signs of a rift appear. Further, the coalition cannot control the future; at any moment an affair may arise—an anarchist may throw a bomb, a bank may fail, an army or civil service scandal be unearthed, a cruiser may sink, a clash between army or naval forces may accidentally occur thousands of miles away—and a new question of principle is suddenly thrust upon a Cabinet of many jointed pieces, and a hungry, tumultuous and theatrical assembly. Moreover, these men do not really get to know each other until they find themselves in the same Cabinet: their life, till then, has probably been spent in unrestrained invective and parliamentary and electoral sniping against each other. Within our individual bosoms, within our own families, within our own group, we are prepared to forgive ugly mannerisms, faulty elocution, the cackle of those who advertise their egoistic *facetiae*; we are prepared to overlook self-seeking and physical repulsiveness,—not that, however, of those outside the pale! They sin! We, therefore, are either too frank or not frank enough. No original loyalty holds the French Cabinet together: it is the adventure which does all, or fails; and it fails too soon.[1]

Doomed Ministries. A majority has been obtained for one or two things: when these are exhausted the Government must rely upon its reserves of character to meet an emergency. It has no reserves of character. Should it observe signs of secession it is obliged to trim its laws and policies to obtain the momentary support of some majority other than that included in the coalition. It spends as much time on the counteraction of guerilla manœuvres as upon administration and the consideration of policy. Its first duty is not to govern, but to keep alive. This was the bitter complaint made by one of the most successful of French Prime Ministers, Waldeck-Rousseau, on the occasion of his resignation:

'We were condemned to adopt as the rule supreme above all others the necessity of not falling. We had to make concessions of principle, while strain-

[1] Cf. Leyret, *La République et les Politiciens* (1909)—and observation shows clearly that the condition obtains to-day: 'Further, the *raison d'être* of these ministries never varies. A calculation creates them, a second calculation destroys them. How they are constituted every one knows. They are entered by the influence of a group, comradeship, intrigue, suppleness They are combinations in which principles play no part. As for reforms, let us not talk of them: they are always being talked about, every ministerial declaration mentions them, all sorts of them; but that does not mean anything: they are the traditional tinsel with which all mountebanks decorate themselves. Only one question is really important: who gets office! . . .'

ing ourselves to baulk their realization. One day, in order to avoid a defeat with which we were threatened by an interpellation from Klotz and Magniaudé, we were obliged to introduce a Bill on income tax; later, we had to enter into the question of workers' pensions. Neither of these things could be actually carried out.' [1]

The members of the Cabinet can rarely be trusted to support each other in the Chambers, not from direct ill will, but because there is insufficient unity of direction in a Cabinet thus composed. The absence of the Prime Minister from debate is always dangerous for a Ministry: his presence is apt to bring him many disappointments. In short there is no Ministry: there is only a collection of Ministers. This weak entity, headed by a Prime Minister who cannot count upon his colleagues except as a result of his own character and extraordinary personal exertion, meets a Chamber only too prepared to show off at its expense. The *flottants* are ready to ebb off to wherever power seems to be moving. As soon as a Ministry makes a concession to a centre group to obtain support, the groups at the extremes become suspicious: as soon as a group on either wing is propitiated, the other wing, and perhaps the centre, is antagonized. Briand is acknowledged as the great political master, not because he is fertile in policy, but because he can keep enough groups in harmony on critical occasions. A ground for overthrowing the Government can always be found, something to rally enough 'floating' votes and all dissentients for a simple resolution; for there is everything to be gained and nothing to be lost. The Government may be overturned by a direct vote of *no confidence*, or the *loss of a desired measure*, or by the most frequently used method, the interpellation upon the Government's policy.[2] The interpellation is only the instrument of the Deputies' fundamental anarchy; and its restriction to Fridays is not operative on matters of confidence in the Government. What is the result? The House is delivered over to behaviour which makes rational discussion of measures wellnigh impossible: hence the additional importance of the Commissioners. The Cabinet cannot control the time of discussion. Law and administration are the subjects of compromises inappropriate

[1] Cf. ibid.: 'Its activity reduces itself to a clever strategy to preserve itself from intestine divisions or parliamentary snares. Besides its declared adversaries who have the right to attack it, it has behind it within its own troops, a mob of "ministrables" clawing it, exciting it by their screams—while preparing to bite and strangle it.' Cf. the same author's *Le Gouvernement et le Parlement*, in *l'Avenir de la France* (written in 1918), p. 134 ff.

Cf. also Jules Roche, *Quand serons-nous en République*, p. 156: 'Ministers, not feeling any solid strength behind them, desiring to live, seeing themselves at the mercy of the Chamber of Deputies, never dare to be themselves, to defend what they think is most just, and fight what they believe to be bad and dangerous. They try above all to get the favour of the majority. "To last" is their one and only device, and when they have to save their lives at the cost of the superior interests of the nation or the Budget so much the worse for the nation and the taxpayers!' See also *Déclarations Ministérielles* (cited above).

[2] Cf. Chap. XIX, *supra*.

to the objects to be effected. Nor is it of any avail for anxious Prime Ministers to bully the House.[1] Reforms are debated, left, and put off for years. A government may not be directly defeated, but it observes that its majorities are falling low, that there are intrigues in the lobbies, and, ominous event! abstentions from divisions increase.[2] At this, some governments reconstruct; but most adopt the equivalent of the threat to resign, which, presented suddenly, in any walk of life, has the momentary effect of producing a reaction of confidence: they ask for a positive vote of confidence, *poser la question de confiance*. This is not done directly, but upon a particular measure; and this brusque, but on the whole weak threat, is the nearest to coercion to which French governments attain.

On critical occasions the régime we have described has been modified for a time, and Ministries have lived an abnormally long life. Thus Waldeck-Rousseau held office for nearly three years (June, 1899–June, 1902), his successor Combes for over two and half years (to January, 1905). The parties of the Left were then hotly engaged in the policy of the Separation of Church and State, and four of them formed a loose confederation to support these Ministers. Their delegates formed a council for the discussion and settlement of affairs prior to appearances before the Chambers. The '*délégation des gauches*', as it was called, was bitterly denounced as destructive of ministerial responsibility, 'a second ministry, extra-constitutional and irresponsible',[3] the oppressor of governments. Combes, at any rate, found the politic answer to his critics:

'The policy I practise is founded upon intimate collaboration of the groups. It supposes a previous understanding between the Government which proposes and the groups which accept. It supposes a community of ideas and views, which after all make it quite indifferent, whether the idea comes from the majority or from the Government.'[4]

In the elections of 1902, however, the Left did not fight as one party, or even as a confederation. In 1903, there already began

[1] Cf. Millerand's outburst in the Chamber of Deputies, 22 Jan. 1920 (*Political Review of the Foreign Press*, Vol. I. No. 13, p. 365): 'I have heard it said that the composition of the Cabinet has caused a certain uneasiness If such uneasiness exists, allow me to calm it. We are not all men of one party. To serve the Republic, to serve France, I invite the help of all.

'I am not going to be the "prisoner" of any faction. Do you suppose that the Cabinet which is offered you, after all the lessons of the War, has any intention of engaging again in that internal discord, or of adopting those administrative practices against which more than one of us have strongly protested? This Government comes before you as one of harmony and efficient work. And what the Government is, that will its subordinates be. Prefects, sub-prefects, officials of every sort have one duty and one only—administration. There can be no suggestion that any official of any class, in any circumstances whatever, will so far lower himself as to become agent of any person or group of persons. If he does he shall pay dearly.'

[2] Cf. A. Ribot, *Lettres à un Ami* (1924).

[3] Chambre, seance, 24 Nov. 1902.

[4] Ibid., 14 Jan. 1905.

strong movements of dissent from the Moderate Left group which considered that Combes was going too far. In 1904, in March, a secretly planned attack resulted in a vote of confidence of 283 against 271 in favour of the Government; and some of the adverse votes are said to have changed to support, pending the count, when it was seen that the Government was not quite beaten. Then the groups broke into factions. A frontal attack having failed, individual Ministers were attacked for widely different reasons. The Minister for War resigned. Doumer, an opponent of Combes, was elected Chairman of the Budget Commission and worried the Government there. Interpellations on the anti-clerical activities of the Prefets raked the Government day after day. Doumer was elected President of the Chamber against a candidate of the Government by 256 against 240 votes. The Government vacillated, sought a vote of confidence, which it obtained by 291 votes against 277, and then resigned. The *bloc* dissolved.

Again immediately after the War, in the election of 1919, a '*bloc national*' was formed, comprising the Centre and Moderate Right Groups,[1] to maintain the Treaty of Versailles, and to operate against everything which could be called Bolshevik. The *bloc* was formed partly to take advantage of the queer system of Proportional Representation introduced in that year, and in this it succeeded very well. Yet no single government stood long upon this basis. Three governments shared two years between them, and Poincaré followed for a long spell which was extorted from the Chamber on the urgent plea of foreign danger (Reparations, the Ruhr, etc.) and financial disaster. In the elections of May, 1924, the *bloc* still subsisted and fought on the common but vague Poincaré programme. On this occasion the *Cartel des Gauches*, a loose alliance of the Left Groups, came into being, to dispute the electoral advantages with the *bloc*, and did so with some success. There followed seven governments which needed the support of groups of the Centre and the Right, until that of Poincaré in July, 1926, which saw the electoral period out.

We may conclude that only in urgent and critical days do governments of any duration arise, and even then they are subject to all the weaknesses of a faulty party system, and defective parliamentary morals. The extraordinary and disquieting fact is, however, that the system is regarded without that zealous critical spirit which often results in reforms, and even so eminent a person as Esmein was prepared to accept the *bloc* system provided policy was not discussed and decided except in the Chambers ('because it is the honour of the Parliamentary system to be a system of free discussion'), that members of groups retained the complete liberty of their opinions and votes, and that there should be no contract between Ministers and the

[1] The Democratic Alliance, Republican Federation, Republican Socialists and *Action Libéral*.

groups which would bind the liberty of action of either party.[1] Even Duguit, whose life was seemingly spent in the research of political realities, does not seem to know whether the Ministers should lead or whether they should follow the groups.[2]

The Opposition. The Opposition is quite as badly organized as the Cabinet. It has no such recognized authority as in England. It is composed of a fortuitous junction of heterogeneous, often bitterly hostile, groups. The Cabinet suffers all the defects of being the result of concentration, but it at least concentrates groups more approximately like-minded than the Opposition. There is, of course, no single opposition, but several opposition groups, and they become one opposition not by concentrating, but by converging. And then, having attained a kill, they diverge. The Government is, therefore, faced by no consistent and regular machinery of criticism, but by irresponsible lethal attacks. For the attackers cannot be sure that they will form part of a government; and if they can be sure of this, they cannot be sure of the policy in which they will be engaged. Hence their criticism is not tempered, as in England the Opposition's criticism is tempered, by the thought that it may one day have to be justified by practice. A premium is placed upon exaggeration and incitement. Nor is that all. The Opposition, as a single body, is only a momentary phenomenon, and disappears at the precise time when the President might desire to call it to office. It is often only a few votes, hardly a score, more powerful than the government it has overthrown; scarcely able, even if united, to govern. The groups, however, are back in their respective camps, and some of them cannot possibly help to form a new government, while some of the old groups must remain in the next combination.

Short-lived Cabinets. The result is, of course, ministerial instability. Between 1873 and 1928, there were sixty-eight Cabinets.[3] Each Cabinet lived on the average a span of only nine and a half months.

[1] 8th ed., I, 284.

[2] IV, 847. 'But we must assert that in spite of its responsibility, rather because of its responsibility, the Ministry must play an active rôle and itself determine the sense of the impulsion given to general policy, except that it must retire if the policy which it follows is disapproved by one of the Chambers. If, instead of this, the Government limits itself to following the impulsion coming from the Chambers, or from one of them, one is no longer in the parliamentary system: one is outside the Constitution. All the power is concentrated then in one of the Chambers, and the Government ceases to be the collaborator of Parliament to become the servant of such and such parliamentary groups. The Government, in short, must have its policy, must defend it before the Chambers and, if one of them disapprove of it, it must go.'

[3] This calculation begins in May, 1873, in order to rule out the formative period after the war of 1870; and excludes three Cabinets which lasted less than a week, as these were little more than *attempts* to form a government. My friend, Mr. Lindsay Rogers, reviews broadly the same facts as I do in his article 'Ministerial Instability in France,' in *Am. Pol. Sci. Qu.*, March, 1931, but his calculations are on a slightly different basis.

There were, counting Cabinets of less than a week, seventy-one ministerial and parliamentary disturbances, a matter which has powerfully contributed to bringing parliamentary government into contempt. The instability is better appreciated if we leave out of the average four ministries of great length for France: then the average time of office becomes eight months. Thus Waldeck-Rousseau was in office practically three years, Combes over two and half years, and Clemenceau two and three-quarter years (1906–9), and again Clemenceau (1917–20, nearly three years); in all eleven and a quarter years. Thus sixty-four governments held office in forty-three and a quarter years; and the average duration was eight months. The following table is also *revealing*.

Duration	Number
6 months and under	28
6–12 months	24
12–18 months	7
18–24 months	1
24 months and over	8

Now, each of these changes of Ministry meant no complete renewal of all the offices, for one or more groups stayed in the new combination—sometimes little more than the overthrow of a Prime Minister occurred. Ministerial changes are, in fact, *ministères de replâtrage*, re-plastered ministries, and the practice of replastering is sometimes called *dosage* or 'dosing' a dying patient. As a rule between one-half and three-quarters of the previous Ministry serve in the new one. This is indeed a mitigation of all the administrative evils which might follow. Yet, the consequences are sufficiently bad, as we shall see from a closer inspection of certain statistics. Further, the political facts have practically extinguished the phrase of the constitution, that Ministries are collectively responsible. There is hardly ever a complete clearance of a defeated Ministry. There are frequent individual resignations.[1] It must have been felt that such frequent changes of the whole Ministry were too disastrous. Yet these individual resignations weaken rather than strengthen the Ministry, and they are often the immediate prelude to a downfall. Once the Deputies have tasted blood. . . .

Intermittent Premiership. The value of a Prime Ministership is lost if the man has not a long and unbroken span of office. In France there were from 1873 to 1928, thirty-eight different Presidents of the Council;[2] their average length of office was thus about exactly eighteen months. But some held office for fairly long spells, and

[1] Consider especially the succession of Ministers of Finance from 1924 to 1928.
[2] Omitting Cabinets under one week.

recurrently. The former table is valid for *continuous* Prime Ministership: the following one for *total service* as Prime Minister.

TOTAL LENGTH OF SERVICE AS PRIME MINISTER

Duration	Number
Under 6 months	10
6–12 months	13
12–18 months	3
18–24 months	5
24–30 months	1
30–36 months	2
36–42 months	1
42–48 months	0
48 months and over	4

Further, the Prime Minister came not as of right, with previous acknowledgement of followers, and the deference of his colleagues. Much of his time was inevitably spent in attempting to secure a practical supremacy.[1]

Loss of Administrative Control. Few men held their Departments long enough to make an informed impression upon the quality of their activity. Nor are they in office long enough to learn the results of their own legislation, or to initiate far-sighted policies. We must remember, also, that French ministries are peculiarly liable to loss of time from practices which are more rigidly regulated in England, deputations, visits from members of Parliament, members of Commissions, etc.; for they have not learnt that to be the tribunes of the people is to have in mind the whole people and not to give way to the solicitations of the persistent.[2] A duty is owed to the inarticu-

[1] Cf. P. Dubois-Richard, *L'Organization Technique de l'État* (1930), p. 205: 'In France it is by oratorical talent that one becomes Prime Minister and it is often legal training which paves the way to this eminence, but once in power, the head of the Government remains what he was; that which entirely occupies him in his office, that moreover for which he feels best prepared, is the constant need of convincing people; he must convince his colleagues in the Cabinet, he must convince the Chamber and the Senate and often the country itself; the preparation of his speeches from the tribune takes so much of his time that there is very little left in which he can act as head of the "State-Enterprise".'

[2] M. Lepine, a high official of long and varied experience, speaking at the Académie des Sciences Morales et Politiques, said (*Séances et Travaux*, Paris, 1928, p. 338 ff.): 'I say that the central authority is not directed, and that is in great measure the fault of the parliamentary régime as we practise it. The ministers are generally chosen not for their competence but for entirely different reasons. They are not allowed the time to study their department and make themselves masters of it. And during their short term in office they are distracted by so many absorbing occupations, audiences, commissions, sessions of both chambers, speeches, journeys, etc., that they are left with no leisure to do the work of administrators, that is to say to direct their departments and to give them the impulsion they expect from the head. "The young officials do not take responsibility: the old refuse it. Instead of searching for solutions they temporize and the mounting flood of files submerges them."'

late, but it is not paid. And the added seriousness of such a situation is this: that the people and the administrators, finding that the responsible Minister can do so little, are tempted to deny the value of democracy altogether, and suggest the establishment of administrative syndicalism, in which the technical head of the service appears before Parliament and does the creative work which a Minister should do.[1]

In spite of the argument that upon the fall of a Ministry some Ministers remain in the next Cabinet, there is a serious discontinuancy in the headship of departments. Thus in the period 1873 to 1928, some fifty-five years, the principal departments had the following numbers of incumbents:

Foreign Affairs	14
Interior	22
Finance	24
Agriculture	27
Instruction	27
Colonies	27
War	28
Navy	32
Justice	34
Commerce	35
Works	38
(Labour since 1906)	12

Thus, the average amount of change varied between once in three and a quarter years, and once in sixteen months. Moreover, even where there was continuity of office it was with different colleagues, with a different Prime Minister, and based on a different parliamentary coalition.[2]

The Senate. The Senate is an extra source of difficulty to the Government. It is true that a government has only been overturned by the action of the Senate thrice in the history of the Republic, but the Government cannot get its legislation through the Senate without taking special time and trouble to do so. Further, it must suffer interpellations upon its policy in that Chamber also. Now the Chamber of Deputies has secured a primacy over the Senate as a representative of the people, and Ministries defeated in the Chamber,

[1] Cf. Henri Chardon, *Academie des Sciences Morales et Politiques*), p. 381 ff., and Robert de Jouvenel, *La République des Camarades* (ed. of 1924), Part II.

[2] This table does not, however, include an account of the Ministries held by Prime Ministers. Heinberg, in an article in the *Am. Pol. Sci. Qu.*, May, 1931, on 'The Personnel of French Cabinets, 1871–1930', and counting on the basis of *eighty-two* premierships, says: 'During thirty of the eighty-two terms, the premier has held the portfolio of foreign affairs; during twenty, that of minister of the interior; ten, that of justice; five, that of finance; and he has been without portfolio during four terms.'

but sustained by the Senate, have no chance of life at all. Though Ministries harassed or defeated in the Senate, but sustained in the House may, and do, go on living, yet there is always the possibility that the obstruction of the Senate, as in 1896, 1913, and 1930, may so discredit or disgust a government as to cause its fall.[1] Hence the Government must in normal circumstances walk warily; the question of confidence was put in the Senate ten times,[2] between 1896 and 1924.

The Government assures itself of support by taking some of its Ministers from the Senate; and in this way, too, it secures the help of many capable statesmen. Since 1873 the Senate has contributed thirteen Prime Ministers out of a total of thirty-nine, and about 200 Senators of about 650 Ministers.[3] Thus Ministries always contain at least two members of the Senate, and often more.

The Commissions. We have already seen that the Commissions play a large part in the legislative, financial, and administrative work of government. They contain old and experienced members of Cabinets, and they are the nurseries of future Ministers. They weaken the Ministers because they are powerful rivals and the Chambers look to them for guidance, whereas, in England, the sources of inspiration are purely Ministerial. Moreover, they are the Deputies and Senators organized as continuous guilds, and they always act as prosecuting attorneys and professional defensive societies, towards Ministers. They cannot see why Ministers should arrogate to themselves full control and sole leadership. Ministers are able, therefore, to suggest that the blame for faulty projects, inappropriate administration, waste of time, and tardiness is upon the Commissions, and no one can discover the exact truth of the matter. The Commissions again, by their power of departmental penetration, are able to prepare the parliamentary defeat of the Ministers.

Results. The results of such a system are easily inferrable, and in practice are patent. There is administrative vacillation, spasmodic interference with, but weak control of the Civil Service, necessary reforms are postponed, finances are disordered (and only a dictatorial régime has been able to improve them), while the sense of responsibility is reduced to the lowest ebb.

The truth is that France is governed by a Parliament in which the basis of action is almost one of unanimous consent, or *liberum velo*, and

[1] On the constitutional law of the matter (and this is one more proof of the vagueness of constitutions) Duguit takes the view that the Government is as responsible to the Senate as to the Chamber; Esmein that the English practice was intended to be followed and ought to be considered as implied by the French constitution. Cf. Duguit, IV, 853 ff.; Esmein (7th ed.), II, 234 ff.

[2] Cf. Redslob, *Le Regime Parlementaire*.

[3] This figure covers the period from May, 1873, to November, 1928, and in the Senate figures appear Rouvier and Ribot, who were earlier Prime Ministers while Deputies. I exclude also General Rochbouet, Prime Minister for twenty days in 1877; he was not a member of Parliament.

government lives either weakly on sufferance or snatches occasionally at dictatorial power to carry out the most urgent defences against financial or administrative collapse.

Secondary Factors. It is clear that in such a system the President of the Republic may claim and obtain more power than the Crown in England. For he represents continuity against change; and his experience is not lightly to be discarded by the Cabinet. There are two types of Cabinet meeting: the *Conseil des Ministres* and the *Conseil de Cabinet*. The former is a meeting of Ministers with the President of the Republic as presiding officer, and it deliberates on *policy*: the latter meets under the presidency of the Prime Minister and deliberates on *tactics*: the one is national, the second, parliamentary. In five years the President sees on the average six or seven governments; he has learnt their hopes, their plans, their policies, their measures, and their fate. The dullest could not have lived without learning, nor could the lessons be without effect upon the Ministers; more, if he is a creative statesman like Grévy, or Poincaré, or Millerand, he cannot be without an added influence upon the Council. And history shows that the Presidents who desired it have been part of the efficient executive of France.

Commissioners. The Constitution gives Ministers the right to assistance by Commissioners during parliamentary debate. This is a right which does not exist in England, which cannot exist in the U.S.A. in open session, but which is of long lineage on the Continent. It is a very valuable gift to Ministers who may have on their benches experts to prompt them, and even to speak in their place where the answer or information is beyond them. In England the officials, by simple custom, stand by the Speaker's chair and whisper their life-saving help to the Ministers. In France, the Commissioner may mount the tribune. The practice of the Constitution permits the help of the Commissioner in the case of bills, resolutions, and *interpellations*. The Commissioner is expected not to make saucy retorts in the manner of Ministers or Deputies; and a respectful demeanour is expected of him. Nor is he permitted to seem to take the responsibility for any action which is the Minister's, and the Minister, too, is held strictly responsible for all the actions of his Department. Further, it has been determined that *questions* must be answered by Ministers. There is an obvious benefit in this practice. It is clear that the expert can deal better with difficulties than the Minister, especially Ministers so short-lived. The technical nature of many bills has proved a serious strain on Ministers in modern legislation, who have to be coached, and are unable to draw on the deep sources of professional knowledge. But there are disadvantages: the one that it takes away from the dignity of Ministers who are often demonstrated to be mere figureheads; the second, that Ministers are the less compelled to

master all the details relevant to a policy or a statute; the third, that sometimes officials, whose actions are in question, are brought forward as commissioners to answer for themselves, and though it is true that they know the facts, the Minister rather should be at once their cross-examiner and their advocate. Yet with careful limitation the practice should be useful in all legislatures;[1] the limitation being that which is aimed at, and on the whole, attained in France, that the Commissioner is nothing more than the technical assistant of the Minister, and never his substitute.

An Unorganized Council. Until the War the French Cabinet had no rules of procedure, no agenda, no minutes, no secretary. There was less preparation for its work than in England before the War. Subjects were introduced by the Ministers or the President of the Council, at haphazard, and treated by a desultory and usually a tediously long and indecisive conversation. In 1916 Ribot created a Secretariat of the Cabinet on the model of the Secretariat of the War Cabinet created by Lloyd George. This was transformed by Painlevé and Clemenceau into an Under-Secretaryship of State attached to the Presidency of the Council. This organization brought together information for the Prime Minister and co-ordinated and energized the work of the individual departments.[2] The organization ceased to be continuous after the War, depending upon the varying personalities of the Prime Ministers.

Complaints were many that the Cabinet was not equipped appropriately for its tasks, and it was suggested that there should be more careful and considered attention to the projects prepared by the Ministries and their consultative councils,[3] that the Presidency of the Council should be aided by a permanent council which would promote both continuity of policy from Cabinet to Cabinet and the ascendency of the Prime Minister,[4] that the number of independent Ministries should be diminished[5] to improve collective council and

[1] Cf. Pierre, pass 641, 642 [2] Cf. *Revue de Droit Public*, 1919.

[3] Cf. Lepine, in *Annales*, p. 339.

[4] Cf. Leroy, *Vers une République Heureuse* (1922), p. 86; Chardon, *Le Pouvoir Administratif*, p. 407; Schatz, *L'Entreprise Gouvernementale*, p. 230; and see especially Dubois-Richard, op. cit. This author was head of the administrative secretariat of the Prime Minister Alexandre Ribot in 1917 and the study in the *Revue de Droit Public*, 1919, was written by him. His opinion is as follows: 'Even if the Chief of State has wide powers it is still necessary to organize the Prime Ministership and give it a bureau of research and co-ordination. . . .

'In the first place the following question must be answered: what are the tasks to be performed by services under the Prime Ministership? Now on this point both experience and reason indicate that the first thing is to give the head of the government every means of forming his opinion with a knowledge of all the logically significant points; that the next thing is to secure the execution of the decisions arrived at, with a minimum effort and in a minimum time; obviously, the services which correspond to these two separate aims are of a very different character: on one hand documentation and research services are needed, on the other co-ordination services.'

[5] The number of Ministries in 1873 was nine; in 1890 eleven; in 1900 twelve; in 1928 (Nov.) fifteen.

provide the opportunity for a more rational, and less minute, division of functions,[1] and that there should be two Cabinets, one composed of the Ministers concerned with more 'technical' duties, the other composed of 'political' Ministers,[2] and even that the present form of Ministerial responsibility should give way to government by a council of permanent officials, organized strictly according to the technical necessities of modern social services, and acting with much more independence and publicity than at present.[3] In 1925, a decree sought the creation of a systematic and permanent secretariat to the Prime Minister. Its work was to fall into four categories, each administered by a special section: (*a*) preparation for Cabinet meetings; (*b*) centralization and dissemination of economic facts; (*c*) advice on administrative and judicial reforms; (*d*) publicity. Further, other bodies, like the Economic Council, the Council of Housing, the Council of National Defence, were to be brought into contact with the Cabinet.[4]

* * * * * * *

The impression we have given of the French Cabinet System is, of course, a somewhat confused one, and it corresponds to the facts. It is impossible to give to the President of the Council that definite consideration which we are able to give to the Prime Minister of England, for the simple reason that that office has not the outstanding and commanding quality of the latter. It is an office obtained by a number of uncontrollable events, and not the natural consequence of years of prominent and responsible and recognized service. There is no special authority in the President of the Council, because though he may be the acknowledged leader of his own group, if he has one, he is too often yesterday's and to-morrow's personal rival of the other Ministers. The practices of the British Constitution in the very troubled and transformative years of 1835 to 1865, the spectacle of Prime Ministers leaving office only to return as a subordinate Minister, is an every-day spectacle in France. There is no special respect for the President of the Council, he seems to act on perpetual sufferance, to be in his place only in order to surrender it to some one else as soon as the situation within and without the Cabinet suggest to whom. Partly as a consequence Cabinet proceedings are unbusinesslike, and filled with personal dissensions.

France could do better; and better would her resources be adminis-

[1] Cf. *Documents*, J.O., 1921, p. 339, *Rapport*, Ministère des affaires étrangères; Barnier, *Au service de la Chose Publique* (1926).

[2] Leyret, op. cit., p. 138.

[3] Cf. Chardon, in *Annales*, p. 381 ff., and Probus, *L'Organization de la Democratie* (1918).

[4] Cf. *Revue Politique et Parlementaire* (1926), 'La Presidence du Conseil,' for a reasoned analytical account of this project. I am informed on the best authority (1931) that the scheme was experimental, and, at least, has been practised but perfunctorily. Nor, in its tentative form, are any results of value expected of it.

tered if she did, for the creative ability of ten or twelve clever men is not to be so lightly wasted as it is at present. But this would involve a change of parliamentary morals, the reorganization of parties, and the revival of the practice of dissolution. Are these possible? To judge by the past, the answer is 'No'! for the French seem too satisfied with social amenities other than the utilities which government provides. They seem to have a genius for organization without a corresponding sense of personal subordination. Meanwhile, the Civil Service bears an immense burden, and occupies a position of great power and authority—more, on the whole, than in any other democracy.

The Groups and the Electorate. One more characteristic of the French Cabinet System remains to be described. It is perfectly clear that the people are not consulted about the Cabinet which is to govern them. All that the people do at the elections is to choose between a number of political units and return some of them to Parliament. That is as far as popular intervention goes. Which units shall combine, and upon what terms a coalition shall be effected, is a parliamentary affair from the decision of which the people are excluded. There is, it is true, a preliminary 'profession of faith' by the various parties during the electoral campaign, but the actual programme of a government never comes before the electorate. Further, the people are never confronted by the possible Cabinet, and it is quite impossible for them to guess what combinations will obtain office. In England, on the contrary, it is known fairly exactly which body will govern or which oppose: the men are known, the programme is known. Whatever virtue there may be in responsibility to the people, is more efficiently established, and realized, in the English than in the French political system. Nor is that all. When an English Ministry dissolves, the record of its activity is coherent and strictly assignable to a single body of men well known because their activities have been advertised, their thoughts, their utterances, and their photographs, thrice daily for four or five years. Not so in France: in each parliamentary term five Cabinets have on the average occupied the highest seats of government; there have been five Prime Ministers, who have sometimes been entirely out of power and sometimes in subordinate office, and Ministers frequently do not appear for re-election all at the same time because some are not Deputies but Senators. There have been about sixty Ministers of different groups or rivals of the same group, some holding office for six months, some for a year, some for three or four years. Some policies have changed abruptly and entirely in the parliamentary term, some have been scaled down, and silently withdrawn or transformed. The Commissions have been partly responsible for changes: Deputies and Senators have taken refuge in abstentions. In such a system there

cannot but be singular reticences for the sake of colleagueship, or violently exaggerated indiscretions. It is one in which the personal element, always so difficult to confine for the benefit of rational purposive argument, is given encouraging opportunities. It seems to me that Rousseau was more prophetic in regard to France than England when he said: 'They are free only once in five years, etc.', for French voters have given up their votes to men who henceforward suffer the least of restraints, whom nothing recalls to a continuous sense of trusteeship. Worse still: the French people are not even free when they vote, for can there be freedom when a choice is made among alternatives whose activity and character in the past has been obscured beyond illumination? Even that is not the end, for the organizations which conduct the electoral campaign, under a party name, and with a 'profession of faith', reorganize themselves otherwise when they are returned to the Chamber. There is not the permanent organization of the party outside and inside parliament: there is no phalanx with one wing in the country and the other in the House, as in England. Parties in France exist for electoral purposes; once returned to the Chamber members do not recognize the discipline of that party, except in the Communist and Socialist ranks where the doctrine of the mandate is accepted, and to a weaker extent in the Radical-Socialist Party. The parties shape themselves, split up, form inter-parliamentary alliances, according to parliamentary exigencies and the state of opinion within the party. The shades of opinion seek for their independent group embodiment; and these are, indeed, so fine, that even the closest professional observers of parliamentary life are confounded by their number, and their cryptic subtlety.

CHAPTER XXV

THE GERMAN CABINET SYSTEM

THE German Reich is now a Parliamentary Republic, and in the centre of its political mechanism is a responsible Ministry. This is the result of the remarkable change in 1919 from the form of government established in 1871, which was called Constitutional Monarchy, but which, in reality, was only a mildly tempered autocracy. The experience of Germany with Cabinet government since the Revolution of 1918 is of interest and value, although it embraces only the period of a decade. Just as interesting and valuable is the experience which preceded and led up to the new system, and we ought to attempt to discover its significance.

THE PRUSSIAN MODEL

The Federation grew under the impulse of Prussia, and by her arms, and unavoidably her autocratic temper and institutions were carried over into the Federation. The ruling classes in Prussia, their King, and the statesman of the Federation, Bismarck, could envisage no alternative. Prussian law and constitutional practice left no doubt about the nature of political authority; it centred in and emanated from the Crown. The Constitution of December, 1848, was a 'granted' constitution, although it said that legislative authority was exercisable by the King and the two Chambers in common. Although its terms could have fostered a popular state, they were permeated and moulded by the monarchical spirit, the supreme philosopher of which, in these very formative years, was Friedrich Julius Stahl,[1] leader of the Christian-Conservative Party. The Council of State was composed of Ministers who had arrived at distinction through a career in the Civil or Military Service; they were not chosen by reference to their qualities as popular representatives, for they had none. Ministers were required, of course, to manage the Landtag in order that political and social and religious liberalism should not force too many concessions, or incite the people, or bring the Monarchy and its Ministers into contempt. More was unnecessary. In such an atmosphere and environment Bismarck was bred; even blaming the monarch and his advisers for weakness in the Revolution of 1848. The test of the

[1] *Rechts und Staatslehre auf der Grundlage christlicher Weltanschauung* (1830–37).

Constitution he himself applied in 1862 when the Diet refused military Credits. The Diet was dissolved; the revenue was raised; and, in 1866, the Diet indemnified its destroyer because he had conquered Austria. That applause, however, sealed the doom of German liberalism, and decided the fate of the Empire, the foundation of which had just been laid in the North German Confederation.

The Chancellorship. There would be no Cabinet system based upon Majorities in the Reichstag, as the Frankfurt Constitution of 1849 had abortively provided.[1] Bismarck was also moved by another consideration: to tempt the Southern states into a Federation all care must be taken to place directive power in the Federal Council, and not in a central Cabinet.[2] It will be remembered also, that though the Federation was given little administrative power, its control was given to the Bundesrat. In this body Bismarck placed the highest authority. The only Federal Minister mentioned in the draft of the Constitution of the North German Confederation was the Chancellor—'the presidency (of the Confederation)', ran Article 13, 'appoints the Federal Chancellor, who presides over the Bundesrat and conducts its business'.[3] Even then, this official was to be regarded more as a Prussian delegate than as a Confederal leader. Bismarck very much feared any isolation from the Bundesrat as much because he wished to unite this and the Emperor, as because he wanted a united body to stand against the Reichstag. It is doubtful whether Bismarck's own plan could ever have worked in practice. However, though he did so much to create the Federation, other forces besides him had served and now turned their energy to the creation of the kind of government they ultimately sought. The National Liberals, Bennigsen, Lasker and Miquel, desired a fully competent Federal Ministry responsible to the Reichstag. Others also insisted on parliamentary responsibility. The central intention seems to have been to overcome any formal constitutional hegemony of Prussia, which would appear to be the consequence of Prussian chairmanship of the Bundesrat and the absence of a Federal executive organ. An Amendment of Bennigsen's to a clause in the Prussian project secured both objects: a Federal executive and its responsibility. The original project ran:

'The Presidency shall possess the power of engrossment and promulgation of Federal laws and the superintendence of their execution. The orders issued by the Presidency are issued in the name of the Federation and are countersigned by the Federal Chancellor.'

This counter-signature, however, only meant that the Chancellor attested that the law and the order were in consonance. Bennigsen's

[1] Art. II, Sects. 73, 2; 74. [2] Rosenthal, *Die Reichsregierung* (1911), p. 4 ff.
[3] Cf. Hänel, *Die organisatorische Entwicklung der deutschen Reichsverfassung* (*Studien zum deutschen Staatsrecht*, Vol. II, Leipzig, 1880).

amendment replaced this second sentence and provided that, 'The orders and rules of the Federal Presidency are issued in the name of the Federation, and for their validity, require the counter-signature of the Federal Chancellor, *who thereby takes over the responsibility*.' This ultimately became Article 17 of the Constitution of 1871.

The intention was not quite to create an office for Bismarck, but political forces in the long run play fast and loose with intentions. A Chancellorship had been created responsible for the executive authority of the Emperor. As Bismarck said in later years:

> 'All at once, by Article 17 of the Constitution the significance of the Imperial Chancellor suddenly became that of a countersigning Minister, and according to its entire status, no longer an Under-Secretary for German Affairs in the Prussian Foreign Office as was the original intention, but a leading Imperial Minister.' [1]

Although Bismarck maintained that he had been strongly unfavourable to this development, he was ever unwilling that a body of Ministers should replace the one, and he succeeded in making his office the most powerful and independent magistracy in the world. Moreover, though he considered the clauses on responsibility as unnecessary legal trifling he did so because he was prepared to take responsibility and leadership. Nor did the clause award him all the responsibility and leadership he inwardly coveted.

The Bismarckian Chancellorship. The Chancellorship thus created had three qualities: it was vested in a single person; it was appointable and dismissible by the Kaiser; it was 'responsible'. The first quality was maintained until November, 1918, but with growing difficulties, partly overcome by the Chancellor's Deputies Law of 1879; the second placed power in the hands of the King of Prussia to be used for Prussian purposes and in concord with the Prussian Cabinet; the third merits special attention.

Autocratic Responsibility. What did 'responsibility' mean? It meant nothing more than that whatever actual power the Kaiser wielded, he was never to be publicly praised or blamed for its employment. Praise and blame were to be concentrated upon the Chancellor, with the implication that the Chancellor's *will* alone should prevail. The tradition, not only of Prussia, but of the large South German States, was monarchical, and this excluded the interpretation of 'responsibility' as removability by the popular assembly and answerability to the people. However, the actual balance of forces in the Federation imposed a sense of responsibility upon the Chan-

[1] Reichstag, 5 March 1878, *Sten. Ber.*, I, 342. There was a point, on 27 March 1871, when Bismarck was even prepared to dissolve the Reichstag to stop the Bennigsen Amendment, since he thought it dangerous to the strength of the Bundesrat on which all his hopes were placed. Cf. Kaufmann, *Bismarck's Erbe in der Reichsverfassung*, p. 43 ff.

cellor. He could not ignore the Reichstag entirely, for it had certain important powers in legislation and finance. Nor could these powers be nullified by a *coup d'état* similar to that of 1862 in Prussia —by the dissolution of the Reichstag; for, first, the Constitution ordered that new elections must take place at least sixty days after dissolution; and secondly, any attempt to overrule this part of the Constitution would have set all the unitary, but liberal, forces against a Federal Constitution which needed every atom of unitary energy to keep it together. Moreover, there were capable men, beloved by popular majorities, in the Reichstag, not seldom in a majority against Bismarck's Conservative friends. Nor was that all. Bismarck had himself created this resort of criticism and control upon a basis of universal suffrage; in return for confederating energy he had sold himself to a force which could not now be slighted. Thus, although there was no convention of answerability to the Reichstag, in fact, the Chancellor could not avoid being answerable to it. He could not govern without a majority for laws and for taxation. Already in 1872 (Reichstag, 9 February), Bismarck was paying lip service to his critics: 'Every Minister is obliged to keep his policy in harmony with the majority of the people which finds its expression in the representative assembly.'

The history of the Imperial Chancellorship is thus the history of the management of the parties of the Reichstag, of astute dissolutions, and manipulated elections. Under Bismarck it was a story of a powerful Chancellor and the successful formation of Government 'blocks' out of the most unlikely of colleagues; but it was also a history of concessions.[1] Under Bismarck's successors it was a history of distraction leading ultimately, from 1908 onwards, to open and confident onslaught on the system, and then, during the War, to an impasse remediable only by a constitutional convulsion.[2]

Yet the Chancellor's task was fraught with further difficulties. It did not follow that the Kaiser could understand the necessity of bowing to the people or to any external force; and if the Kaiser

[1] Cf. speech in Reichstag (Kohl, *Reden*, IX, 243): 'It makes an immense difference what kind of Parliament you have. If you have a Parliament with a strong certain majority, homogeneous and organized under the kind of leadership as England under the two Pitts or Canning or even Palmerston and Peel—well, that would be a force, a mass, where even such a strong King as William of Orange, or a clever King like Leopold I of Belgium could only prevail with great effort, but even then they would succeed. Yet always would a Parliament like that be a tremendous power which in certain circumstances could limit the Upper House and the Crown to a very small place and little movement. When we have that, Gentlemen, then come here again, and we will talk the matter over again. But a Parliament, which consists of an appreciable number of groups, 8 or 10, which has no constant majority, or recognized united leadership, ought to be pleased if there exists the ballast of a royal government, a royal will in the vessel of state. If this did not exist, all would *fall into ruin, and chaos appear.*' *Cf. also* Rosenthal, *op. cit.*, p. 70.

[2] Cf. Ludwig, *Wilhelm II*, and Bulow, *Memoirs*.

could be propitiated there was still the Court circle and military and ecclesiastical Ministers who surrounded the King of Prussia. They had to be taken by storm. Between an exigent majority and a radical minority in Parliament, and a narrow-minded God-and-class-intoxicated Court, between a Prussia with its Prussian interests and a Bundesrat with German and sectional interests, the Chancellorship became a burden intolerable for one man. The King had to be persuaded to concede, yet the Chancellorship itself could not maintain its prestige if the concessions became numerous. The Crown must be weakened, yet not be thought weak.

Bismarck's reminiscences and speeches are full of the nature and burden of his task.

'Absolutism primarily demands impartiality, honesty, devotion to duty, energy and outward humility in the ruler. These may be present, and yet male and female favourites (in the best case the lawful wife), the monarch's own vanity, susceptibility to flattery, will nevertheless diminish the fruits of his good intentions, inasmuch as the monarch is not omniscient and cannot have an equal understanding of all branches of his office. As early as 1874 I was in favour of an effort to secure the possibility of public criticism of the government in parliament and in the Press, in order to shelter the monarch from the danger of having blinkers put on him by women, courtiers, sycophants and visionaries, hindering him from taking a broad view of his duties as monarch or from avoiding and correcting his mistakes. This conviction of mine became all the more deeply impressed upon me in proportion as I became better acquainted with Court circles, and had to defend the interest of the state from their influences and also from the opposition of a departmental patriotism.' [1]

'A real responsibility in high politics can only be undertaken by one single directing minister, never by a numerous board with majority decisions. The decision as to paths and by-paths often depends on slight but decisive changes, sometimes even on the tone and choice of expressions in an international document. Even the slightest departure from the right line often causes the distance from it to increase so rapidly that the abandoned line cannot be recovered, and the return to the bifurcation, whence it was left behind, becomes impossible.' [2]

Secrecy covered the tracks of policy; causal relationships were obscure, Ministers were satisfied with the formal side of business and uninterested in its substance; while serious nervous and mental effects followed differences about official prestige and conflicts of jurisdiction. All this Bismarck supported by reference to the history of Prussian Cabinets. He might have gone further had he compared closely the evolution of the English parliamentary Cabinet with the Prussian absolutist Cabinet: in England party loyalty to principles and persons assuaged wounded pride and diminished Ministerial rivalry; in Prussia the contact of a number of men dependent directly upon the King and without any means to power and preferment save in his personal regard, could not avoid producing a state of acute

[1] *Reminiscences* (Tauchnitz Edn.), I, 38. Cf. also Vol. I, Chap. VI ff., and II, 68.
[2] Ibid., II, 69, and cf. speech in the Reichstag, 1 Dec. 1874.

hostility and chronic intrigue between them, and the sometimes vindictive contests between the King and some of his Ministers for the King's own benefit. England herself suffered from these bitter internecine Ministerial quarrels until Parliament asserted its authority and Cabinets came to be chosen from one party. The root cause lay, and must always lie, in the immediate dependence of Ministers upon the personal whims of the King, or Dictator, and their independence of party. Hence Bismarck's tears and thoughts of suicide during the campaign of 1866.

THE ANATOMY OF RESPONSIBILITY

Bismarck always returns to two things: the impossibility of absolute government, and the excessive burden of responsibility when borne by one man. It was not merely the physical burden of multitudinous affairs which bore him down (though that is a matter which already suggests the necessity for colleagues), but the spiritual burden of knowing that he was *in doubt* and *alone*. The following passage finely analyses the psychology of responsibility and we italicize the most revealing phrases—all except 'with certainty', which Bismarck himself emphasized.

'It is a hard trial for the nerves of a man of mature age when he is compelled suddenly to break off his former intercourse with all, or almost all, his friends and acquaintances. My health at that time had long been impaired, not by the labour which I had to perform, *but by the continuous sense of responsibility for the great events which placed the future of my country at stake.* Of course it was impossible during the animated and sometimes stormy development of our politics always to foresee *with certainty* whether the road which I took was the right one, and yet I was obliged to act as though I could predict with absolute clearness both coming events and the effect which my own decisions would have upon them. The question whether his own estimate, his political instinct is leading him rightly, is difficult enough for a Minister *whose doubts are set at rest* as soon as he feels himself sheltered under the royal signature or a parliamentary majority: a Minister, one might say, of Catholic politics, who has got absolution and is not troubled by *the more protestant question, whether he has got absolution from himself.* But for a Minister who completely identifies his own honour with that of his country, the *uncertainty of the result* of each political decision has a *most harassing effect.* It is just as impossible to foresee with certainty the political results at the time when a measure has to be carried, as it would be in our climate to predict the weather of the next few days. Yet we have to make our decisions as though we could do so, often enough fighting against all the influences to which we are accustomed to attach weight. . . . The consideration of the question whether a decision is right, and whether it is right to hold fast and carry through what, though upon weak premises, has been recognized as right, has an *agitating effect* on every conscientious and honourable man. This is strengthened by the circumstance that often many years must elapse before we are able in political matters to convince ourselves whether our wishes and actions were right or wrong. *It is not the work which is wearing, but rather the doubts and anxieties: the feeling of honour and responsibility,* without being able to support the latter by anything except our own convictions and our own will, and this is more especially the case in

the most important crises. *The intercourse with others whom we regard as similarly situated helps us to overcome these crises*; and if this suddenly ceases, from motives which are personal rather than external, envious rather than honest, and in as far as they are honest, of the most illiberal character, and the responsible minister suddenly finds himself boycotted by all his former friends, treated as an enemy, *and then left alone with himself and his deliberation*, this must increase the ill-effect of all his official anxieties upon his nerves and health.' [1]

A Genius-System. The passage shows that it is impossible for any ordinary man to govern a great State for long years without institutional arrangements for helping him to bear the responsibility. The chances of error are too great for a sensitive man to suffer alone. Be his desire to govern independently never so great, and his capacity of the highest, he must anxiously seek fellow-culprits, whether they are the people who elect him, and therefore are accessories before the fact, or a parliament and responsible colleagues who continuously co-operate with him. In other words, the system of ministerial responsibility with a collective basis is not merely the offspring of the democratic desire to control governmental leadership, but is deeply rooted in the general human characteristic (save in the genius and fanatic), to seek some one to share its spiritual burdens of uncertainty and loneliness. Systems which are not founded upon this —Genius-Systems—like Bismarck's, Mussolini's, and Lenin's, kill any but their original incumbents, or are themselves destroyed by the world of average men who demand a machine which shall be continuously manageable by them and their average posterity. Bismarck's successors broke under the strain—and what an enormous strain it was Bülow's *Memoirs* now reveal—and finally the system was lowered to the stature of ordinary shoulders.[2] Was there not more in Bismarck's saying, 'Were it all to come over again I would be republican and democrat', than mere resentment at his dismissal?

We may, upon reflection, easily understand the acuteness of Bismarck's anxieties. Government, on its highest levels, inevitably imposes upon its servants the task of making decisions whose effects are terrible and irrevocable. Though the act of government produces the welfare of some, perhaps of the majority, the statesman must always be troubled by two doubts: is that welfare morally desirable? and even if it is, is the price which must be paid for it by the beneficiaries, or others (and the two are never conterminous), justly exact-

[1] *Reminiscences* (Tauchnitz Edn.), III, 90–2.

[2] Cf. Ludwig, *Bismarck* (1926), p. 324: '"He believes", said Roon in those days, "that he can win over everybody by diplomatic dialectics and kindly shrewdness, thus leading every one by the nose. With the conservatives he talks conservatism, with the liberals he talks liberalism. In this way he either displays a sovereign contempt for all his associates, or else he is giving himself up to such incredible illusions as horrify me. He wishes *à tout prix* to be all things to all men, now and in the future. This is because he feels that the edifice which he has begun to build will collapse amid the scornful laughter of the world as soon as his hand is withdrawn. He is not so far out there; but does the end justify the means?"'

able? Even if this question is settled to the satisfaction of the statesman's intellect, the question still remains whether his conscience can possibly approve what must be done. It may be easy to decree the confiscation of a class or of a single person, and imprisonments and exile may cause small hesitation. But what if steps are requisite which inevitably and directly result in killing, either as judicial execution, as assassination, or as the prosecution of a war? Of course, where a statesman is an unfeeling brute, without imagination, the problem does not arise, for he will act without apprehending that he is responsible. When, however, a country is blessed with a sensitive statesman, the problem is harrowing. We cannot misunderstand why he should anxiously desire to consult with others, in the eventual hope of being able to say that as the policy was not wholly his, neither should be the moral censure. A variety of motives may press to this result: the hope of continuance in power, the love of country and belief in the ultimate virtue of the policy pursued with the desire *to fulfill it, an ethical or religious inhibition, whose cold firm hand* reaches out from unknown recesses to clutch the wayward, sheer weakness and compassion with suffering, fear of unpopularity, inability to endure the suspense of attending the consequences without a confidant to whom to 'Unpack the heart with words'.

For some such reasons monarchy and dictatorship have never been absolute, but always tempered by advisers and friends, and there is an unquenchable tendency to vest responsibility in boards and councils. Another way out of the difficulty, however, is for the statesman to be assured of oligarchic or popular approval by election. This process implies an explicit declaration of trust for a certain period, and then and afterwards it is always open to the statesman to say, 'The responsibility, at any rate, is not wholly mine, for the people knew me and my policies, and they endowed me with the power. They must have known and sanctioned what I was prepared to do.' This is a considerable relief to those burdened with grave and torturing decisions, for the world is, after all, a place full of uncertainties, and the government of man is liable to every sort of error, and it is, perhaps, to hope too much of average nature that virtue will be *understood, as most men wish it to be understood, of* themselves, and in their own life-time.

The problem, however, at once arises: does not collective responsibility and responsibility to the people extinguish the vital fires of creativeness in the very men and women in whom they should be given full vent? Is not to share responsibility and to owe it, the means of destroying the sense of it, and the fullness of constructive leadership? There is no doubt that when we act as trustees, and owe an account to others, we are not our full selves; and equally without doubt is the fact that when we act with others the full burden, not

being imposed upon us individually, all our powers are not evoked. Whether the result, however, will be the best to meet the situation, depends not on the diminution of individual effort and the modification of personality, but whether the collective mind of such subordinated individuals will or will not be better than that of a single person acting without colleagues or responsibility. The answer depends, of course, upon the comparative quality of the minds collected and the mind of the single leader. We cannot judge of the virtue in oneness or manifoldness apart from the quality of the one or the several. Whether many are more timid than one, or he more than many, whether or not they are more creative, depends entirely upon the amount of mind they have between them; and not upon the fact of their number or answerability to the people. Indeed, the single leader may be more timid, more frightened than several in co-operation; and much more timid than an elected body. As the number of geniuses is small, and their appearance on earth irregular and incalculable, mankind has done wisely in accepting the idea of a council responsible to the people; for this at least ensures continuity of government, and decisions made with the consciousness that one man's views may be clever but unbalanced or bigoted. Nor does the fact of responsibility exclude, though it undoubtedly controls, the spontaneous sense of responsibility. But what if the sense of responsibility of the single leader is defective? Then, as in Germany, the results may be disastrous.

The Chancellor's Substitutes. In 1879 the Substitutes Law was passed to give the Chancellor subordinates to relieve him of departmental routine without, however, sharing the responsibility for the creation of policy. In 1867 a Chancellor's Department had been created under Rudolf von Delbrück to act as the administrative machine for the Chancellor's duties. A large part of the administrative work was taken over by some of the Prussian Departments who were appointed by the Chancellor as his helpers and deputies. Yet the central responsibility was the Chancellor's, and in proportion as the Federation assumed its duties the amount of business which came before him, personally, necessarily increased to an intolerable magnitude. The growth of business led inevitably to the differentiation of administrative staffs and quite soon to the branching-off of separate Departments: the Foreign Office, a Federal Admiralty, a Department of Posts and Telegraphs, a Department of Justice, and the Treasury, the Federal Railway Department, and others.[1] It was found that a strict interpretation of the Article requiring the Chancellor's counter-signature could not possibly work, and to avoid the Constitutional misgiving which had arisen when Delbrück had countersigned during Bismarck's absence, the Substitute's Law was intro-

[1] Cf. Rosenthal, op. cit., Sect. 4.

duced by Bismarck.[1] This is not to assert that there were no other motives for the Bill. In fact, Bismarck had already seen the need of locking the Reich and Prussia together by some continuous administrative arrangements, and, as in the case of the personal union of the Imperial Chancellorship and the Prussian Prime Ministership, he desired that his substitutes, responsible to him, should be Prussian Secretaries or Under-Secretaries of State.[2]

Bismarck's ulterior motive, expressed in the Bill, in the clause providing that the substitutes should be members of the Bundesrat, was defeated, but the Bill was passed in a form sufficient to give relief and yet maintain the definite and responsible primacy of the Chancellor. Bismarck repudiated any suggestion of an Imperial Council of Ministers—a responsible body of sovereign leaders he sought, and saw in the Bundesrat; and if he were to be considered as a Prime Minister, then it was in the sense of the *only* Minister who could appoint and dismiss his subordinates as he desired.[3] The Act provided (1) that the Chancellor's counter-signature for Imperial Orders and Rules and Constitutional activities might be vested in substitutes who were appointable by the Kaiser at the suggestion of the Chancellor should he not be able to act; (2) that a substitute could be appointed for the complete scope of the Chancellor's duties; (3) that substitutes could be appointed for each Department of Federal administration. As regards responsibility the law proceeded to say that to the Imperial Chancellor is reserved the right personally to carry out any official duty even during a substitute's term. It is worth notice that the condition of the appointment of a substitute is that the Chancellor asks for it; thus the initiative remained with the Chancellor. Of as much importance is the fact that the Chancellor could intervene in any business at any time. Finally, Article 2 expressly provided that only the heads of Imperial Departments could be made substitutes. This excluded the possibility of appointing Prussian Ministers to such office: but it did not exclude the possibility of making the substitutes members of the Prussian Cabinet, which was in many cases done.

What had been accomplished? At first, and during Bismarck's time, nothing but the creation of a number of principal clerks to the Chancellor for his relief. These Secretaries of State were, of course, given spheres of discretion. Without that there would have been no relief. Moreover, there was a growing field of policy which the Chancellor could not possibly decide by himself, where devolution was forced by the pressure of business. Yet the theory of single responsibility was strenuously maintained by Bismarck and his successors.

[1] Cf. memorandum. Roëll u. Epstein, *Bismarck's Staatsrecht*, p. 72 ff.
[2] Oncken, *Bennigsen*, II, 326, 327.
[3] Roell u. Epstein, *op. cit.*, pp. 84, 85.

This was the law. In fact, the history of Germany until the Revolution teaches that though the Chancellor was legally responsible, the Ministers acquired more and more powers of independent decision, and even the right to report directly to the Emperor, so that the Chancellor often accepted responsibility for decisions he did not make. In the sphere of the highest policy, however, he played a leading part. Another threat to the Chancellor's position was revealed in the Federal Civil Service Act of 1907, in which the substitutes appeared as 'political officials', and were therefore dismissible by the Emperor. As we know, the power of dismissal influences the power to appoint and to make policy. One thing is supremely certain, that the conception of a Minister or a Ministry responsible to the legislature was vigorously repudiated,[1] and repudiated on the grounds that the Federal compact would be thereby disturbed—how the devil can find excuses!—and that bad government must follow the institution of a Cabinet based upon fluctuating majorities in the Reichstag. Thus the Chancellor remained the one Minister of the Reich.

Prussia. We must once more insist upon the complexity and difficulty of the Chancellor's position. He could not, as Chancellor, initiate policy: he was legally only a servant of the Kaiser. His power was derived from the extent to which the Kaiser would grant him, or not be able to withhold from him, his own authority and influence. But the Kaiser was King of Prussia, and he and his Cabinet had the nomination of Prussian representatives in the Bundesrat. This promoted the power of the Chancellorship, for if he could command such appointments and dictate the policy to be followed by the representatives, then he had a power of leadership. Prussia, on the other hand, needed the Chancellorship, for that office was the vehicle of Federal administration and the Presidency of the Bundesrat. Hence the personal union of the German Emperorship with the Prussian Kingship was the quintessential feature of the German Constitution. It followed that the Chancellor was obliged to be either the Prussian Prime Minister, or when the Prime Ministership became too onerous, hold some other important Ministry in the Prussian Cabinet. This was to demand an extraordinary amount of physical strength and nervous energy from any one man, and Bismarck not infrequently complained of the difficulties. One way out was to appoint his substitutes to membership of the Prussian Cabinet, and when this was done the Chancellor's way was naturally smoother. The practice, begun under Bismarck, was continued under his successors, who needed the institution even more than he.

Effects of the System. Thus a Genius-System had been created by an extraordinary man to support the weaknesses of his Federal arrangement, and to give an outlet adequate to his personal energies.

[1] Cf. Poschinger, *Bismarck und die Parlamentarier*, V, 149 ff.

It placed all responsibility upon one man, a precarious thing for a great State. It reduced the amount of collective counsel to a minimum, and instead of fostering a succession of capable leaders, it seems, at any rate under Bismarck, to have succeeded only in diminishing the stature of all concerned with government.[1] Moreover, the system had a very demoralizing influence upon political parties, for those conscious of their popular support were hypersensitive to their constitutional incapacity to command the Government. Those which supported the Government were regarded by the Opposition as traitors to democracy as well as to good policy, and the cry that men prefer office to ideals came easily, as it always does. Those who did not, on principle, support the Government, were denounced as 'enemies of the Fatherland'. Everything fostered parliamentary dissension, and an unusual amount of malice and spite. Since, also, party programmes were unrealizable, every inducement existed to convert these into irresponsible essays in incitement. Nor must we forget, that since party did not keep either the Imperial or the Prussian Ministers together, there was an amount of internal friction abnormal to English conditions.

But the principal feature of the system and that which without any doubt caused its downfall was this: that it left the way open to the King by divine right to take whatever personal decisions his character demanded and could enforce, and did not provide the Chancellor, who, at least, had arrived by a selective process, with any power of retaliation against the Crown short of counselling a parliamentary revolution. It pitted personal force against personal force; King and favourites against Chancellor and other favourites. While Bismarck and William I co-operated, the system worked well, because of Bismarck's character and ascendancy. After Bismarck, there was an assertive megalomaniac Emperor, with an aristocratic and popular following, and a succession of too weak Ministers. Caprivi, Hohenlohe, Bülow, Bethmann-Hollweg, attempted to play the game of rigging the favourites—unsuccessfully. The memoirs touching the reign of William II show clearly that political leadership lay in the hands of any casual friend who could influence the Emperor and his courtiers, whether the Chancellor agreed or not. *The capture of German political leadership by the generals, in war-time, was the natural corollary of this.*

There is still one thought prompted by the system. It seems to have been by its nature only a fair-weather craft, it could survive no serious storms. It must never be forgotten that the life of the Constitutional system of 1871 coincided with the full advent of the industrial system in Germany, and the country became rich and power-

[1] Cf. Rosenberg, *Die Entstehung der Deutschen Republik* (1928); Scheidemann, *Memoirs*; Bulow, *Memoirs*; Ludwig, *Kaiser Wilhelm II.*

ful in a monarchical system. The upper and middle classes could exert pressure upon the monarchy, which instead of being the defender of the claims of the propertyless against them, was accessory to the subordination of the working class. To those classes, and to the more fortunate poor, *post hoc ergo propter hoc* was not an unnatural argument. In spite of this the Social Democratic Party and the left wing of the Progressive Party increased in strength, and they and their Press did not mince their criticism. There is no doubt that the growing perception of their social and economic subordination, and its Imperial support in law and practice, put the workers into permanent opposition to the State: at the elections of 1907 the Socialists polled three and a quarter (out of about eleven and a quarter) million votes, at those of 1912, four and a quarter million (out of about twelve and a quarter million polled), and this in a country where dissolutions and elections were arranged most conveniently for the Chancellor.

Fulminations against the monarchical system reached their zenith in 1908, during the scandal of the *Daily Telegraph* interview. The incident is a splendid revelation of Kaiser-Chancellor Government. The Kaiser was an irresponsible dabbler in foreign policy. During the Boer War he had contrived to wound English susceptibilities to the deepest. During the manœuvres of 1908 he thought there was an opportunity of soothing English feeling, for years exacerbated by slights, insults, posturing, and the tendencies of German naval policy. An interview was drafted for the *Daily Telegraph*. It went to Bülow the Chancellor, who, on holiday, sent it to the Foreign Office, asking them to 'Revise Carefully'. The Under-Secretary in charge (it was the season of the summer vacation) did not read the MSS., but passed on the revision to an Assistant Secretary. The Assistant Secretary, satisfied that the Chancellor had 'conveyed the sense of uneasiness', merely corrected some misstatements, but was not frank about his feeling that it was inadvisable to publish the interview. The Under-Secretary received it back and would not read it, but signed it. Ambassador von Muller received it but did not read it, and sent it on to Bulow. Bulow did not thoroughly examine the document, and signed. It was received at Berlin and then taken by the Secretary of State to Bulow whom he was summoned to see on other business, and, in a hurry, did not examine the contents, but received Bülow's assurance that he had attended to the matter personally. . . . Thence to the Emperor, and then to the *Daily Telegraph*. All those responsible had not read it: the Emperor had read it but was not responsible, and, at least, he could not check himself; and the Assistant-Secretary believed that the All-Highest could not be challenged by him. The interview was a lengthy paranoiac diatribe, a continuous insult to English pride, and a completely uncalled-for provocation to Japan. There was a genume outburst of censure not only from the Opposition,

but from the German Princes, the Bundesrat and staunch Conservatives. Not only was the monarchy in disgrace in parliamentary circles, but worse still, the comic papers made mockery of the Kaiser's intimate association with God! Censure in the Reichstag was mordant.[1] Yet Bülow could not desert the Emperor or let in parliamentarism. Nor could the Reichstag force a more adequate machinery of responsibility, for there was no majority without the Conservatives, and though these were critical about the Kaiser's behaviour, the effective remedy, a parliamentary executive, meant the transfer of social and economic predominance to the liberal middle classes, and, soon after, to the working classes. To save themselves the Conservatives must save the monarchy. Under this reprieve from decisive damnation the Imperial head was once more raised, though Bülow spoke earnestly to his master in private.

The task of a great State with a large industrial population, living in a world of democratic neighbours, and with spiritual and personal bonds interwoven with more liberal political systems, is indeed hard, and this was experienced by Bülow in 1909 when he fell as a result of the defeat of his Inheritance Tax by the Conservatives and the Centre, his erstwhile allies, and again, when, in 1912, the Liberals went decisively into opposition with the Socialists, and in 1913, during the Zabern affair, when the Government was emphatically censured by a large majority composed of Social Democrats, Liberals, and the Centre Party. This *bloc* was destined to make the Constitution of 1919. The social system was too complex to live happily under a monarchy controlled by a landed and ecclesiastical aristocracy.

Administrators not Statesmen. It was a necessary consequence of the German system that Chancellor and Ministers could not be statesmen trained in politics, but men trained in the practice of administration. Whatever may be validly said about the deficiences of the parliamentary Minister, he has at least graduated in a school which teaches the management of men and the appreciation of imponderable ethical magnitudes, as well as inferences from numbers. He may not have learnt the expert answer to technical questions, but he undoubtedly learns what questions ought to be asked and answered. This is summed up in Harcourt's saying that the Ministers exist to tell the Civil Service what the public will not stand. Government is the art of composing differences. It may be accomplished by surrender, compromise, or conquest; and these may be pursued by moral suasion and (or) threats of violence. Its technique is obviously different from that of the specialist in a particular branch of human affairs and the world of matter, and consequently the preparation for its pursuit imposes its own conditions. The statesman

[1] *Sten. Ber.*, 10 and 11 November 1908. Cf. also *Die Grosze Politik der Europäische Kabinette*, XXIV, 165 f.

applies moral judgements to the march of events, and attempts to influence their direction by the pressure available. All his difficulties lie in treating with men. That necessarily requires that he shall possess or acquire a deep insight into men's character and motives, and learn the conditions and limits of their malleability. Bismarck, a diplomat by career, possessed these qualities in a supreme measure, Bülow suppleness without hard courage. Not so his successors and colleagues: they were variously deficient; they were bred either as jurists or as soldiers, or as academic men, and, then, specialized in some single branch of administration, and arrived at the top mainly by talent in that particular respect. Bülow's *Memoirs* show how keenly their author was aware of the danger of defects of these qualities. Thus between 1870 and 1918 there were eight Imperial Chancellors, of whom seven were jurists by training, and one of military training; while professionally, three were in the higher administrative service, one was a professor, one a barrister, one a general, one unknown, and the other a Prince (Max von Baden), that is, 'no occupation'. Of the Secretaries of State between 1870 and 1918 nearly 73 per cent. were jurists by education, and 15 per cent. had passed through the army schools; while by profession, 70 per cent. were civil servants and 14 per cent. army officers, and among the rest was a bürgermeister (Michaelis) who took the Ministry of Interior.[1] But we have seen that, of Germany, Prussia was the most considerable and character-giving part. What was the situation in that State? Broadly this, that of 100 Ministers[2] between 1870 and 1919, seventy-five were Civil Servants; four local officials; fourteen were army officers; three were farmers; one, an industrial; one a private employee; and the other a Prince. Of these, seventy-one had been legally trained and seventeen militarily trained.[3]

These figures show (*a*) that both by training and profession the range of experience and mentality in government was narrow; and (*b*) that it was not the kind to be adequate to the complexity of the society and the nature of the people to be governed. This the majority of German people themselves began to feel during the later and disastrous days of the War. It was realized too late that the foresight, the pliability, the freshness of mind which, because it springs of ignorance, asks fundamental questions, the experienced apprehension of mind-movements in large masses of people, was a

[1] These figures go as far as the entrance of Parliamentarians of the Social Democratic Party and of the Centre into the Ministry in September, 1918; otherwise the percentages under what was really the old régime would still more emphatically show the characteristics already revealed.

[2] Actually there were 99.

[3] These figures are taken from Kamm, *Minister und Beruf*, *Allgemeines Statistiches Archiv*, 18, 440 ff. Kamm's commentary is interesting, but adds little to the inferences already made by English students. His figures, which are more detailed than those reproduced, are very interesting.

good to be preferred in the supreme direction of the great State, far outweighing the value of expertness in self-created blinkers. The importance of this is enhanced when we remember that the generations between 1870 and 1914, though trained in legal studies, which in Germany included, as they do not in England, economics and administration, yet concentrated upon the metaphysics of law in books rather than the conditions of law in the making and in action. Even the law-teachers themselves came to recognize that their teaching was of small value for creative living. There were men whom we presume ought to have known better, who supported the system on the ground that no modern State could be so badly governed as by a system of ministerial instability as in France, or so well as by experts as in Germany,[1] but others represented by Max Weber,[2] and Preusz,[3] recognized its disastrous effects not only upon Government but upon the people, and prepared the mental ways to responsible government.

The Nemesis of Irresponsibility. The War revealed two further weaknesses of the old Ministerial System of Germany and Prussia. The system assumed broadly that there was no necessity for an agreement between Government and people before action was taken. This operated not badly in fair weather. For it takes a fool of astronomic dimensions to do immediate and obvious damage to a great modern State. Much more was demanded from Government in war than in peace. In England and France the people knew their leaders—or believed they did; they believed that Ministers were men of their choice; and had been accustomed for generations to the view that a responsibility rested upon themselves for that choice. It was natural to expect them to support even the mistakes of their leaders, and to repair any damage by extra effort. The State was in danger, *they* were the State: they must defend themselves, and for this, no effort, naturally, ought to be refused. Indeed, the War was conducted by Liberals and Radicals, as many men of the Left as of the Right! In Germany this was not so. While the victory and the stories of victory warmed the hearts of citizens all was well; they were at one with their Government. But after two years of indecisive war, industrial conscription and food difficulties, a questioning began which could not be stilled. Nor could even the presence of the All-Highest himself overcome the sullen apathy of the munition-makers. For they saw that they were not the State; that they had no real control whatever over leadership and therefore over the destiny they were asked

[1] Cf. Schmoller, article in *Zwanzig Jahre Deutscher Politik* (1897–1917): 'Wäre der Parlamentarismus fur Deutschland oder Preussen richtig.'

[2] Cf. Weber, *Parlament und Regierung* (1919), and his life by Marianne Weber.

[3] Preusz, *Das Deutsche Volk und die Politik* (1915) and *Obrigkeitstaat und Volkstaat*. Cf. also his collected essays in *Recht Staat und Freiheit*. Cf. also Bredt, *Der Deutsche Reichstag im Weltkrieg*, Vol. VIII, Series 4, in the Parliamentary Investigation of the Causes of the War.

to accept. More still, the real state of the country and the military situation was known only to a very few. It was not necessary to consult the parties; and there was no compulsion to do so. It was, however, more necessary than anywhere else in the world to maintain the illusion of absolute, if not of speedy, victory, for the prestige of success, not the sense of shared responsibility, was the title of the ruling class to its office. In other countries the public mind was always stimulated by the news that there was danger; in Germany it was necessarily drugged. Suddenly, then, out of the blue, after inordinate exertions, and unparalleled privations suffered on the continuous and immaculate assurance of victory—suddenly, Army Headquarters itself was heard to be in despair! The system collapsed.

It has been said that it fell through a class-war, 'literally over a piece of bread'.

Large masses of the middle classes and the peasantry seceded from the Conservative Party and the National Liberals, and the Catholic Centre, reminded of its Christianity by Erzberger and of its Christian Trade Union following, moved to the Left. The direction of the War, which meant the direction of all Germany, had since the end of 1916 fallen into the hands of Ludendorff and the General Staff, and the Kaiser had been effaced. The Opposition hardened. Already in March, 1917, the Social Democrats, the Independent Socialists, and the National Liberals, demanded a Constitutional Committee to revise the Constitution. The demands became clamorous. At Easter, Constitutional reforms were promised for after the War, the main promise being the institution of direct and equal suffrage in Prussia, the agitation for which had begun before the War and continued with increasing, and then critical, emphasis.[1] The famous Peace Resolution, won against the Government and Ludendorff, was carried in the Reichstag. Bethmann-Hollweg fell; Michaelis fell, Hertling fell. The Government was in a permanent minority. The Russian Revolution eliminated a foreign foe, but the sealed carriage from Switzerland to Russia which contained Lenin, and with which Ludendorff successfully infected Russia, proved to contain a powerful toxin to which Germany succumbed. The Spartacists formed on the Socialist Left. Strikes broke out. Could the country be rallied?

THE TRANSITION TO A PARLIAMENTARY EXECUTIVE

Attempts were made. At the end of 1917, Von Payer of the Progressive Party was made Vice-Chancellor, and the Deputy Prime Ministership of Prussia was given to Von Friedberg, a National Liberal member of the Reichstag. A law was passed in August, 1918,[2] on the 'Composition of the Reichstag and Proportional Representation

[1] Cf. Bergstrasser, *Wahlrechtsfrage im Kriege* (1929). [2] R.G.Bl., p. 1079.

in Large Constituencies', which added forty-four seats in the hitherto under-represented industrial constituencies. This would never have been done by the Government and Conservatives save under duress.[1] On 30 September 1918, when an armistice was already being sought by the Supreme War Council, the Kaiser in a decree directed to the Chancellor Hertling, promised a parliamentary system.[2]

'I wish that the German people should co-operate more effectively than before in the determination of their destiny. It is therefore my will that men who have the people's confidence shall participate in a large measure in the rights and duties of government. I bid you to bring your work to a close by continuing the work of government and to put into operation the measures I want, until I have found a successor to you. For this I await your proposals.'

Max of Baden, a prince with a reputation for political liberalism, was appointed Chancellor, with a Cabinet of Secretaries of State chosen from the Reichstag [3] and made '*Commissioners* (not members) before the Bundesrat' in order not to forfeit their membership of the Reichstag. Max of Baden introduced his Government to the Reichstag on 5 October with a declaration reminiscent of those made by newly-formed French Cabinets.[4]

On 22 October a Bill amending the Constitution was introduced by the Government 'to free the new Government from its Constitutional limitations which still stand in the way'.[5]

The amendments [6] were as follows:

(1) Declarations of War require the confirmation of Bundesrat and Reichstag; treaties of peace and other treaties within the scope of Federal legislative competence need the consent of both Houses.

(2) The Imperial Chancellor requires the confidence of the Reichstag for the conduct of his office. The Chancellor bears responsibility for all acts of political significance undertaken by the Emperor in the execution of his powers under the Constitution. The Imperial Chancellor and his substitutes are responsible for the conduct of their office to both Houses.

(3) The nomination, seconding, promotion and retirement of naval officers and men, must be countersigned by the Chancellor. (These had hitherto been within the uncontrolled competence of the Kaiser.)

[1] The work of the Constitutional Committee came to nothing. Cf. Anschutz u. Thoma, *Handbuch des Deutschen Staatsrecht*, p. 91.

[2] Stier Somlo, *Verfassungsurkunden*.

[3] They were Trimborn, Bauer, Solf; Scheidemann, Erzberger, Haussman (the last three without portfolios). The following were Secretaries of State (who retained their offices from the Hertling Ministry): Krause, Roedern, Rucklin, Freiherr von Stein, von Waldow, Ritter von Mann. Cf. *Memoirs of Max of Baden* (trans. 1928), II, 29; cf. also Scheidemann, *Memoirs*, II, 481 ff.

[4] Cf. ibid., pp. 32–9, for his declaration made in Oct. 1918.

[5] Reichstag, 22 Oct. 1918.

[6] R.G.Bl., Nr. 144, pp. 1273 and 1274 (28 October 1918).

(4) The Chancellor's counter-signature was required for the highest appointments in the State contingents of the Army, and

(5) The appointment, seconding, promotion and retirement of military officers in the State contingent; and for the good government of their contingents the War Ministers of the States are responsible to the Bundesrat and Reichstag.

Thus the irresponsible Executive had been overthrown. The reforms, too, were suspended by the Revolution and the abdication of the Kaiser and Princes. The spirit of change thereby grew stronger and produced the Constitution of 11 August 1919, and in especial, the clauses on the Executive. For a couple of months the floods of Constitutional desire let loose a storm which seemed to threaten the chances of Parliamentary Democracy—for the Soviet System across the Russian border was strong meat for feverish spirits. The threat was, however, without substance, and in the elections of January, 1919, for the Constitutional Assembly, majorities were returned for whom the parliamentary way and the Cabinet system were the very breath of their political lungs.

The Cabinet System of 1919. Let us consider the Cabinet System as instituted by the Constitution and moulded by political behaviour. These things will be observed: the extensive and detailed regulation of the system in the Constitution and other documents, the intentions leading to the adoption of the system, the effects of the party system upon it.

The Constitutional Articles. The Cabinet system is formally based upon (I) certain articles in the Constitution,[1] (II) certain articles in the Law of the Budget,[2] and (III) the Rules of Procedure relating to the Imperial Government.

A President, elected by the people, has a number of powers:[3] 'all orders and decrees of the President . . . require for their validity the counter-signature of the Federal Chancellor or the competent Federal Minister. The counter-signature implies the undertaking of responsibility'.[4] This goes not far beyond the terms of the old Constitution, and the virtue of responsibility lies, as we have seen, in the body to whom responsibility is owed. This article says no more than that the President is not responsible; that some one else is; but says not to whom.

Responsibility is broadly defined further on in the Constitution.[5]

'The Chancellor of the Federation, and the Federal Ministers require for the administration of their office, the confidence of the Reichstag. Any one of them must resign, should the confidence of the House be withdrawn by an express resolution.' And, 'The Chancellor of the Federation determines the main lines of policy, for which he is responsible to the Reichstag Within

[1] Principally, Arts. 52–9.
[2] Cf. *Reichshaushaltsordnung*, Art. 21.
[3] Arts. 45–9, and cf. Chap. XXVI, *infra*.
[4] Art. 50.
[5] Art. 54.

these main lines each Federal Minister directs independently the department entrusted to him, for which he is personally responsible to the Reichstag.' [1]

It will be observed that 'for the administration of their office' would include the counter-signature of Presidential actions; and for such administration responsibility is to the Reichstag.

The rest of the clauses deserve further comment. Unlike the French Constitution provision is that responsibility shall be to the Reichstag, the popular assembly alone. This arrangement marks the tremendous gulf between the present and the old Constitution from the standpoint of Federalism, for it is a recognition and a guarantee that the body representing popular unity is paramount over the Reichsrat which represents States—while in the old Constitution the Bundesrat was the source and guardian of Federal leadership.

Next, a difference in status is assigned to Chancellor and Ministers. The Chancellor is given a superior status in the determination of general policy, for which he is made specially responsible. The Ministers are to keep within the main lines, cannot, apparently, be interfered with in their departments by either their colleagues or the Chancellor,[2] and bear, individually, the responsibility for that office. Does this mean that the Ministers are subordinates in the sense that they cannot participate in the making of the general lines of policy, and that they cannot in their own departments go beyond express or understood limits settled by the Chancellor? On this question there seems to be a good deal of doubt in theory, though we shall see that practice has decided the question in the sense that the Chancellor is no more important, and is sometimes less important, than his colleagues. What then prompted this arrangement and the consequent problems? These clauses originated with the creator of the Constitution, Preusz,[3] and were accepted, in their original form, by the States Committee which examined the Constitution before its introduction into the Assembly.[4]

Let us examine Preusz's views up to this point. He rejected both the Non-Parliamentary Executive of the U.S.A., and the Conciliar System of Switzerland, in which the Government is a directly elected committee of Parliament,[5] and provided for a titular Executive (the

[1] Art. 56.

[2] It will be remembered that under the old system the Chancellor could intervene at any time in any department.

[3] Compare Entwurf des Allgemeinen Teils der Künftigen Reichsverfassung, *Reichsanzeiger*, 20 Jan. 1919.

[4] Cf. *Entwurf*, 21 Feb. 1919, Heilfron, op. cit., I.

[5] The Swiss Legislature consists of the National Council, elected every three years, and the Council of States, representing the various Cantons. In Joint Session, as the Federal Assembly, these Councils elect the Federal Council, the *Bundesrat*, of seven members, as the Executive for three years. The parties are proportionately represented: and members are usually re-elected for long terms. The action of this Council is marked by compromise and occasionally serious dissension, internally, and before the public. The Assembly elects the President annually; he is the titular

President) popularly elected, and a responsible Cabinet. Of the Cabinet [1] he said:

'The President of the Reich is not limited in the selection of Ministers, and most importantly, of the Chancellor, to members of Parliament; because it is by no means an essential requisite of the parliamentary system that the leading statesmen shall be members of Parliament; but it is quite essential that they shall conduct the government in agreement with the parliamentary majority, and that they must resign should the majority deny them its confidence. For the general policy of the government the Chancellor is responsible; and ministers are appointed by the President upon his nomination. These are, however, not, as hitherto, non-independent and subordinate helpers of the Chancellor, but stand towards Parliament as independent statesmen responsible for their Departmental administration.'

Observe, then, the emphasis on the departmental character of the Ministers! Preusz continues: 'For the formal responsibility of the Chancellor for every individual Department would, as in the past, so in the future, be a fiction weakening the true political principle of responsibility.' That is, let us have done with a mere fiction, and concentrate upon those who do the work, to whom the Chancellor is obliged by the pressure of business to devolve the work, and let us hold them directly responsible.

'And the agreement of the parliamentary majority with the general direction of the government's policy does not necessarily include the acceptance of the administration of each individual Department. Much more will the desirable influence of Parliament over the practical conduct of administration be strengthened, where Parliament can produce changes in the conduct of individual Departments without a change of the whole Government.'

Preusz thus put his finger on one of the weaknesses of collective responsibility for all and everything in the British system, and attempted to obtain the advantages of Ministerial stability with true Parliamentary strength in criticizing and eliminating unsatisfactory Ministers. He saw the British Constitution in books; and perhaps the passage out of Morley's *Walpole* struck him (as a German desiring efficient government) with more force than it really possesses; for we have already shown that collective responsibility makes Ministers preternaturally aware of the infirmities of candidates for office, causes them to restrain the foolish; even then a colleague who has really committed an error in an unimportant matter may be dropped, while if there has been an important error the Minister may save his colleagues by resigning. While Ministers command a good majority for all except a particular Departmental policy it is the Minister, not the Cabinet, who will go.

head of the Republic and Chairman and Leader of the Council. (For powers, etc., cf. Fleiner, *Schweizerisches Bundesstaatsrecht*, and Bonjour, op. cit.; Bryce, *Modern Democracies*; and Brooks, *Government and Politics of Switzerland*.)

[1] The reasons given by Preusz for the rejection of these alternatives are outlined in the Chapter—*Chiefs of State*.

What Preusz has not so far shown was whether his differentiation could be made to work. His concluding remarks on these clauses serve to show that he was unsure of his ground, for he said:

'Out of this arrangement of the relationship between the Chancellor and Departmental Ministers, practice will cause a more collective co-operation of the government, without the "collegiate" system being formally prescribed for it by the Constitution, a thing which is not to be recommended in the interests of *clear* political responsibility.'[1]

Thus he envisaged collective action, and could therefore have safely prophesied collective general policy, and a collective feeling of responsibility and collective resignations in most cases. Further, had he reflected that, in the future, Cabinets would be composed of members of a large number of different parties, he would not have imagined that any arrangement could possibly produce any clearness of political responsibility. In introducing the project into the Assembly, Preusz added little to his explanation: the Chancellor was now 'President of the Imperial Ministry', and the 'collective' system was not prescribed, but left to the moulding force of practical needs. This sounds as though already the Chancellor's superior status was reduced to nothing more than the position of the British Prime Ministership, and that practical experience already showed the inevitability of collective counsel and responsibility.

In the Constitutional Committee. We now follow the Project into the Constitutional Committee. There two tendencies prevailed: (1) to strengthen the Chancellor and (2) to set out more clearly the nature of the relationship between Ministers and the 'Government' as a collective body. (1) The Chancellor, in Preusz's draft,[2] was appointable by the President, but the Ministers were to be nominated by him and only then appointed by the President. Then, apparently, the Presidency was strengthened at the expense of the Chancellorship, by an amendment that both Chancellor and Ministers should be directly appointed and dismissed by the President.[3] The Reporter of the Constitutional Committee on this part of the Constitution was Clemens von Delbrück, himself a former Secretary of State in the Empire, and son of Bismarck's colleague and Vice-Chancellor. He showed that several parts of the machinery were lacking. Insufficient, for instance, was said regarding the power of the Chancellor and his relation to Ministers. Was a 'bureaucratic', that is, a 'Chancellor'-system envisaged, or a 'collective' organization? To him the problem was:

'To create an institution in which power and unity are combined, that is to say, a responsible institution—*one* responsible institution let it be noticed

[1] My italics. [2] Art. 69. Project.
[3] Art. 75 of Project of Constitution actually introduced.

—must arise in which all the threads come together, an institution which is in the position to supervise all the items of business in broad features; and we must, on the other hand, decentralize not only in depth but in extent.' [1]

Delbrück's suggestions were adapted to this end, and were supported by reference to Federal and Prussian history. He suggested (1) that Ministers should be appointed only on the nomination of the Chancellor; form ought to add authority to what would, at any rate, be the practice, (2) that the Chancellor should preside over the Government, (3) that the Government as a body should create rules of procedure to be ratified by the President. All these things would strengthen the Chancellor, and this must be done lest 'on one fine day Government gets entirely out of hand'.[2] Then (4) there should be an *express* provision (till then not suggested) that 'the Chancellor decides the general lines of policy'. This gives the Chancellor the power to intervene in the administration of each individual department with the observation: 'I warn you that the policy of the Department is no longer in accord with the lines I have laid down. On the other hand, it must be said that the Ministers, within these lines, are *independent* in the conduct of the branches of business entrusted to them'. (5) Now, since Prussian and Federal experience had shown quite clearly that certain things affect all Departments, arrangements must be made for their collective treatment: all Bills, including the Budget, all differences of opinion about the treatment of affairs touching several Departments, and other matters already allowed for by the Constitution—e.g. the dissolution of the Reichstag. (6) Finally, let the resolutions of the Government be taken by majority vote, and give the Chancellor a casting vote. This would enhance the importance of the Chancellorship.

Here, again, Preusz moved nearer to collective counsel: the Chancellor ought to be more than *primus inter pares*, yet not the single chief of the whole apparatus of government; and, as to collectivity of counsel, 'I think of *political* collegiality, which, however, is not bound by legally rigid and unpliable forms. In my opinion one cannot organize a government council-wise as one can organize a collective tribunal. The matter must be elastic, even as the relationship of President and Government is elastic.'[3] Again, as to the procedural arrangements, Preusz thought they were best left out of the Constitution, since to put in details of that kind would mean the difficulty of amendment either through Parliament or the Referendum. As a compromise he suggested that the Constitution should simply

[1] *Bericht und Protokolle des 8 Ausschusses, Verfassungsgebenden Deutschen National Versammlung*, 1919, Nr. 21, p. 297 ff.

[2] Ibid., p. 299. The phrase is '*ganz auseinanderlaufen*'.

[3] Ibid., p. 300.

say that Rules of Procedure be made by the Government and ratified by the President.[1]

As to the Chancellor's power to nominate Ministers, he had put that into his own draft, and the States Committee had struck it out on the plea that the President of the Reich had already so modest a position that its further attenuation was undesirable. Preusz had answered, that whether it was put in the Constitution or not, in practice the Chancellor would choose his own colleagues.[2]

The question was raised whether Ministers could report directly to the President, and Preusz's answer was that a Minister would be expected to come to an understanding with the Chancellor first. 'But I exclude any mediatization of Ministers by the Chancellor in relation to the President. Every Minister has the right to communicate with the President; but the Chancellor must have the general supervision of such conversations.'

The general opinion of the Committee seems to have been that summed up by Deputy Koch that 'neither a purely Collective nor a purely Chancellor-System was appropriate',[3] and by Delbrück's conclusion that a Chancellor-System was not wanted, while Collectivity was necessary to abolish contradictions—hence his suggestion for decision by vote.[4] In short, something not exactly defined, between the Bismarck-System and the Cabinet-System with collective counsel and responsibility was sought—but it was not positively and comprehensively stated what this should be. There are points beyond which inventive thought cannot reach, since the number and magnitude of the interrelated and present-future changing imponderables cannot be precisely and fully seized in words; then, we cannot help quieting our doubts with simple inklings, and prescribing only the very little which seems certain.

Final Adoption. Delbrück's additions were accepted almost verbatim by the Committee and the Reichstag, hardly a word being said in discussion or explanation of the Cabinet-System in the Second and Third Readings of the Assembly. What, then, had been created? A government: 'The Federal Government consists of the Chancellor of the Federation and the Federal Ministers.'[5] That is to say, apparently, a *governing body*, a council. Were all subordinated to the council on equal terms? The intention was to give the Chancellor a distinct and effective primacy, and this was believed to have been accomplished (*a*) by naming him as a separate party in the Government, (*b*) by his power to choose his Ministers, (*c*) by his presidential

[1] This is quite a good commentary on the thesis that political experience does hold valid and influential lessons: the constitutional experiences of the nineteenth century showed clearly that to put details into a Constitution was simply to bind oneself to maintain the very matters in which flexibility and flux were most desirable.

[2] Ibid., p. 301. [3] Ibid., p. 302.

[4] Ibid., p. 303. See also Katzenstein, ibid. [5] Art. 52.

authority over the Government, 'The Chancellor presides over the Federal Government and directs its business, according to standing orders drawn up by the Federal Government and approved by the President of the Federation,' [1] (*d*) by his right and power to determine the main lines of policy,[2] and (*e*) his power to give a casting vote. Were people thinking of a collectivity when they thought of 'Government'? Perhaps; indeed, most likely; but we do not really know. Preusz seems to have expected this to come about.

The only express arrangement for subordination to the Government as a collectivity was in Article 57:

> 'The Federal Ministers must submit to the Federal Government for advice and decision the draft of all Bills, also all matters for which such a course is prescribed by the Constitution, or by law, as well as differences of opinion upon questions affecting the sphere of action of several Federal Ministers.'

The last sentence obviously opens the way for a very large amount of collective action; the first, on bills, leaves hardly anything out of collective counsel, while the middle term, 'prescribed by the Constitution', may come to include not only written amendments to the Constitution, but conventional occasions upon which there shall be Cabinet counsel. What exists, however, is not the general presumption of collegial leadership, but a limited necessity for collective activity. It is true, however, that Delbrück's whole argument was to secure a proper co-operation among Ministers.

One other thing seems to operate against the idea of collective action and to promote the ascendency of the Chancellor and disintegration of the Ministry, and that is the attempted differentiation of the responsibility assumed by Chancellor and Ministers, the Chancellor being responsible for 'main lines' of policy, the rest, individually, for its Departmental realization, and subject to loss of office 'should the confidence of the House be withdrawn by express resolution'. Yet Preusz's remarks would cause us to think that this was only in order to enable a bad member to be lopped off an otherwise healthy body.

I do not see that anything else can be obtained by an examination of the text and the discussion, and the 'construction' of the articles by jurists in Germany seems to me to be futile in so far as it is pretended that one can obtain light from the sources.[3]

The Rules of Procedure and the Budget Act. Even the rules of procedure and the special position given the Chancellor by the Budget Order have not preserved the legal dogmas from unceremonious repudiation by the political parties, but before we examine this and its causes let us consider the contributions made to German Government by the Rules of Procedure and the Budget Order.

[1] Art. 55. [2] Art. 58.

[3] Glum, *Die Staatsrechtliche Stellung der Reichsregierung. Theorie des Reichskanzlers und des Reichsfinanzministers in der Reichsregierung* (Berlin, 1925).

The Rules of Procedure were made in 1924,[1] that is after five years' operation of the new system. Until this time the Ministers had co-operated either without formal regulations or on the basis of casual rules. By 1924, then, there was experience of Ministerial business and of the dependence of the Ministry upon the Reichstag to go upon. The Rules of Procedure are also interesting examples of the German passion for committing their social arrangements to systematic statements of law. No other country, save Prussia, has such rules in such deliberately and carefully planned arrangement. Let us briefly consider their contents.

The Rules fall into four sections: the Chancellor; the Chancellor's Deputy; the Ministers; the Government.

The Chancellor. The Chancellor lays down the main lines of policy and the Ministers must proceed within them and execute them within their sphere of business. In cases of doubt the decision of the Chancellor is to be asked.

The Chancellor is to be continuously informed of all measures which are important for the determination of the main lines of policy and the conduct of the business of government. He may at any time call for further information, and has the right and the duty of insisting upon the uniformity of the policy of Ministers. Changes contemplated by a Minister in the accepted principles, or new measures entirely of general political significance, must be brought before the Chancellor for his decision.

The Chancellor's Deputy. At the Chancellor's suggestion the President of the Reich can appoint one of the Ministers to deputize for the Chancellor, in which case the Chancellor determines the scope of the deputization.

Ministers. Their Departmental field is determined broadly by Presidential Orders, and within these by Ministers acting in agreement, or by the Chancellor, upon a resolution of the Government. Wherever an activity concerns more than one Department, the principal and initiating Ministry (called in German the *federfuhrend*, that is, the drafting, Ministry) must call in the other Ministries from the beginning. Drafts of Bills must not be put before members of the Reichstag or its Committees before a decision has been made by the Government, exceptions to this requiring the assent of the appropriate Ministers and, where they are of 'political' importance, of the Chancellor. Before consulting the committees of the Federal Council, or the States Governments (according to Article 67), the Minister must confer with any Department which is likely to demur on essential points, and decide how far the States shall be let into the business pending the settlement of differences.

[1] 3 May 1924. Cf. Poetzsch-Heffter, *Vom Staatsleben unter der Weimarer Verfassung, Jahrbuch des Öffentlichen Rechts*, XIII (1925), 174 ff.

Deputations are, as a rule, receivable only by the appropriate Ministry; a common reception may be given when the subject requires it. The Chancellor receives deputations only exceptionally and as a rule only at the instance of a Minister.

Foreign negotiations are only to be conducted through the Foreign Office, its assent and co-operation are required should other Ministries desire to negotiate. Interviews touching foreign affairs are not permissible without previous arrangement with the Foreign Office.

The Government. The following subjects are to be brought before the Government for discussion and decision:

1. All projects of laws, all matters prescribed by the laws or the Constitution, differences of opinion on questions which touch the business of several Ministers.

2. Drafts of all Orders which are of general political significance; public announcements and citations from public archives where these should occur simultaneously by the Reich Government and the states; suggestions for the appointment of high and unclassified officials and assistant secretaries,[1] and the variation of the established conditions of certain Civil Service posts.[2]

Further, matters of general domestic or foreign importance, of broad economic or financial effects, must be brought to the attention of the Government before action is taken, even if they are not submitted for decision. All matters which are submitted to the Government should previously be discussed by the Ministries concerned. (This rule was made because the Cabinet became overburdened by unnecessary sectional business in the earliest stages of preparation. At first a way out of congestion was sought in the constitution of an 'inner Cabinet', or an 'economic-political Cabinet Committee'.)[3] Exceptions are permissible where there is urgency. Any unsettled points are made known to the Chancellor with explanatory minutes. . . . Differences of opinion between Ministers, as envisaged by Article 57 of the Constitution, are not to be submitted to the Government until all attempts at personal arrangement have failed. The Chancellor is given power to attempt a settlement between Ministers before the Government as a whole is seized with the matter.[4]

Rule 24 is designed to secure the full concentration of leadership in the Government and to avert disunity in relation to the branches of the Legislature. When the Federal Council suggests important changes in a Government Bill the Government must be consulted on the next step; similarly, if a Minister concerned takes exception to

[1] *Ministerialdirigenten, Ministerialräte.*

[2] e.g. The promotion of an official of the intermediate class to the Higher division where the candidate is not yet forty years of age, or has not served at least twenty years. Art. 19 of the Rules binds Ministers very strictly to make no pledge whatever before the Cabinet is consulted.

[3] Cf. Poetzsch-Heffter, loc. cit., p. 179.

[4] Rule 23.

a proposed amendment. Important amendments offered by the Reichstag have the same effect. Where the case is urgent and a decision must be taken at once, then agreement with available Ministers is required.

'All bills resolved upon by the Government are to be represented in the Reichstag, the Federal Council and the Economic Council concordantly, even if individual Ministers hold a different opinion. *All officials, directly or indirectly concerned, are prohibited from acting against the views of the Government.*'

The business of Cabinet sessions is regulated with some detail. Ministers are informed of meetings through the Secretary of State to the Chancellery. The Chancellor's Secretariat arranges for the production of the necessary documents, and draws up and distributes an Agenda. Resolutions and bills of great importance may not be put on the Agenda earlier than four days after their circulation to Ministers. Any two Ministers may secure the removal of such business from the Agenda if this rule is infringed; but the Chancellor may override this on the plea of necessity. The Chancellor or Deputy is in the Chair. Sessions are confidential. 'Especially is information about the arguments of individual Ministers, voting, and the contents of the Minutes, impermissible, without special authority.'[1]

At Cabinet meetings there are regularly present the Chancellor, Ministers or their Deputies, the Secretary to the Chancellor's Department, the Chief of the President's Office, the Chief of the Government Press Service, and a Clerk. The Deputies have full rights of discussion and voting. Ministers may, where this seems desirable, and with the agreement of the Chairman, introduce a permanent official, who may be present only for the time and the specific purpose for which he is called in. This arrangement seems to me of extraordinary value in the modern state and, of course, it has from time to time been followed in England, when officials are called in to help Ministers in matters where policy and technical knowledge cannot be separated, and do especially important service in Cabinet Committees. Minutes are taken, and the relevant extracts distributed to the various Departments.

The Minister of Finance. It is well understood in the British system that the Chancellor of the Exchequer has a position of exceptional importance, and often of extraordinary power.[2] The reason is simple: the Chancellor of the Exchequer must find the money which his colleagues have planned to spend. He must not be driven to impossible demands upon the public, and, therefore, he has been provided with a power of defence. Beside this, however, there is his own positive sense of responsibility for the industry and commerce of the country, and the private purse of the citizen. A Gladstone, or Harcourt or a Snowden is strong, and, in single combat with any

[1] Rule 29. [2] Cf. Chap. XIX, *supra*.

Minister, is usually sure of victory. Disputes of any magnitude become Cabinet questions, and there the battle is between the Chancellor of the Exchequer and the majority against him, for the support of the Prime Minister. The Chancellor and the Prime Minister together are, in all ordinary circumstances, irresistible.

German law follows the essentials of English practice. In the Reich Budget Order of 30 December, 1922, the Minister of Finance was provided with a veto over the inclusion of expenditure or a rider in the Budget. This veto can only be overcome by a majority of the Cabinet and if the *Reich Chancellor is in this majority.*[1] In other words, Minister of Finance and Chancellor can together settle the Budget. This arrangement was forced into law by the financial difficulties of the post-war period.[2] Yet the rule, which also appears in Article 32 of the Rules of Procedure, does not square with the Constitutional clause which says that decisions are taken by a majority vote. Indeed, both Delbrück [3] and one other member of the Constitutional Committee,[4] emphasized that Ministers ought not to become dependents of the Minister of Finance. The Order was therefore passed with the majorities required for constitutional amendments. It is obvious that, legally, the position of the Chancellor and the Minister of Finance is by this Order raised above that of other Ministers and above the position given by the Constitution, while the other Ministers have been made legally subordinate for financial purposes. It is a well-known fact, however, that where men enjoy a legal predominance they will very probably acquire an actual predominance, owing to the compelling effects of legal concepts on the mind of those who come into relation with them. Nor does the effect threaten to stop at this point: for a power in one direction is a power to intimidate and bargain in every other. It may be overcome by the political resources of the other Ministers: but it is still a power to overcome, which requires a countervailing force.

The Actual Operation of the System. Can the position of the Reich Chancellor be reduced? Is the Minister of Finance sure of the power given him by the Constitutional amendment? Do majority votes decide matters? All these things may be subjects of formal prescription, and again, formally, they may follow the course provided by the Constitution and the Rules of Procedure, and yet the balance of political forces may govern the actual substance and nature of the formalities. Thus a Chancellor's main lines of policy may be written down by him and be formally called his: yet what was established may have been the result of the compulsion of a party whose co-operation was essential to his ever having been able to accept the

[1] R.G.Bl., 1923, Nr. 2, Pt. II, p. 17, Art. 21.
[2] Cf. Glum, op. cit., p. 42. [3] *Protokolle*, p. 301. [4] Ibid.

Chancellorship. A Minister of Finance may threaten to use his veto power over an estimate, but what if he is told that its use will cause him to be outvoted on an ordinary measure which his party considers vital? A majority and a minority in the Cabinet are in the process of formation: the minority asks for concessions and, unless they are granted, it is prepared to withdraw from the Government. No better governmental arrangement can be made in the existing state of parties in the Reichstag and the country. The majority must to that extent give way. In short, the majority vote now is not based upon the equality of Ministers, but upon the political strength of each in the special circumstances. There is no doubt, when we consult the experience of Great Britain and France over a long period, that various Ministers assume different significance at different times. Sometimes there is a kind of instinctive subordination to the Foreign Minister, sometimes all defer to the Departments concerned with unemployment, and almost always the Treasury is rather overpowering.

The experience of Germany shows that the party system has so filled up the bottles of the Constitution that these have burst.

Formation of Cabinets. We have shown in the cases of England, France, and the U.S.A. that the composition of the Executive determines its power. So with Germany; here as in England and France, all goes back to the character and number of political parties. *Had Germany a two-party system or something near it, then the Constitutional articles might be made to work in admirable and accurate accord with their intention*: but it has not. (1) The President of the Federation appoints and dismisses the Chancellor, and, on the latter's recommendation, the Federal Ministers. This article appears to give the President a free hand with the Chancellor, and the Chancellor a free choice of Ministers, including the Minister of Finance. In fact, the President is very narrowly limited in his choice; and the Chancellor, before he can accept the Chancellorship, must be able to get a group of colleagues. But these can normally afford to be extremely exigent before they enter his Government. For the German Parliament, like the French Chamber of Deputies, is divided into a number of parties, none of which, since the Revolution, has been able to approach a majority of the Assembly. The situation therefore dictates coalition Ministries.[1] The President, therefore, is obliged to find a Chancellor who can discover a coalition which will fulfil two conditions: obtain a Reichstag majority, and maintain it for an appreciable time so as to avoid political vicissitudes. This second condition has been borne in upon the Germans by their own long experience of stable, if autocratic government, their desire for regularity and order in all things, and the warnings which they have obtained from their intellectuals who have

[1] Variously called *Arbeitsgemeinschaft* (Working Agreement), *Koalition*, or *Block*.

ever paraded French ministerial instability as something which Germany must at all costs avoid.

The principle that the largest party is to be called in to lead the Government, provide a Chancellor and form a Ministry, has been rejected for the principle that the prime consideration is the speediest formation of a practicable Cabinet. After the elections of May, 1924, the German National Party Press urged that the President would violate the principles of Parliamentary Government if he did not choose the Chancellor from that party, as the largest ; [1] yet Chancellor Marx of the Centre Party was asked to form a Ministry, and the Nationals were left in the opposition. Again, when the Stresemann Ministry fell, in November, 1923, the German Nationals insisted, in a letter from the leader of the party to the President, that 'as parliamentary usage demanded', one of the Opposition Parties should be entrusted with the formation of a new government. They themselves were prepared to accept office, dissolve the Reichstag, and consult the people anew to see whether, indeed, the country was not turning to the Right for a Government.[2] To this the President answered that (1) the Constitution left him full discretion in the matter, (2) the use of this discretion had on his part been directed to securing 'a personage, whose political position seemed to promise most hope of the speedy composition of a workable Cabinet', (3) confidential discussion with Reichstag group-leaders had convinced him that the opposition parties offered no hope of this, and (4) that even the German Nationals had admitted their readiness to follow a Chancellor of the Popular Party and the Centre. It is to be remarked that, in this letter, Ebert admits his partiality for a coalition of the Left, rather than the Centre,

[1] Cf. Purlitz, *Geschichts Kalendar*, date cited, and Wertheimer, *Der Einflusz des Reichprasidenten auf die Gestaltung der Reichsregierung*, 1926.

Elections of May, 1924: German Nationals, 105 seats; Centre, 65, and Bavarian People's Party, 16; Social Democrats, 100; Communists, 62. Six other parties of the Right and the Middle shared the rest of the seats.

[2] DEAR MR PRESIDENT,—

On the resignation of the Stresemann Cabinet, Parliamentary usage demanded that one of the opposition parties should be entrusted with the formation of a Cabinet. This did not occur. On the contrary, you, Mr. President, made numerous unsuccessful attempts to form a Cabinet in entirely different ways. In the meanwhile both the foreign relations of the State and the psychological and economic need of the German people have become so acute, that further delay in forming a new Cabinet cannot be justified. An overwhelming majority of the German people awaits a departure from the past methods of government and a fresh orientation towards the Right. If the Reichstag, through its excessive duration, is not capable of expressing public opinion, then you should invoke the decision of the people and give the power of dissolving the Reichstag to a newly formed Cabinet. We should give support to the creation of a Cabinet on such conditions.

With greatest respect,

HERGT,

Chairman of the German National Party.

30 *Nov.* 1923.

Cf. Poetzsch, op. cit., p. 164.

and says he accepted the Centre only because his first attempts had failed.[1]

Experience has shown that the influence of the President depends upon the parliamentary balance of forces and the general situation of the country. He may prefer and obtain a coalition of his own cast of mind if the strength of parties and the alternatives are evenly balanced; he may, as in the case of the Cuno Cabinet of 1922 and Luther in 1925, nominate a Chancellor outside Parliament in the hope of setting the machinery of Government to work, and securing the neutrality of large parties, when the Reichstag is split between irreconcilable extremes, and when the temper of the country regarding parliamentary institutions is ugly; he may appoint a minority, like the Brüning Government, when it is the only feasible way, owing to the preparedness of Reichstag Groups to lend a passive tolerance for fear of letting loose anarchy. According to circumstances he may nominate a Chancellor and risk his defeat, or negotiate with the parties before taking a decisive step. The President may decide between alternatives, but the choice is not wide. For the rest the Chancellor is dependent upon an arrangement with other parties for his Cabinet, and the alternatives are too often embarrassing both in their number and character. In 1930, for example, Brüning had the alternatives of coalitions of the Left, the Centre, and the Right. The coalition entails agreement as to policy and office. Often many vain attempts are made to secure the first before a candidate for the Chancellorship succeeds. Days and weeks pass by, with the most difficult nerve-racking negotiations, before an agreement is reached.[2] This is not to the advantage of industry, commerce, finance and international economic and political relations. At least one projected Cabinet fell through owing to the insurmountable obstinacy of the groups for office.[3] Now, this is not only a struggle for a job, but also for the

[1] Cf. Letter of President Ebert, ibid., p. 165.

[2] For example, a period of negotiation, between the third and fourth Marx Cabinets, lasted from 17 Dec. 1926 to 3 Feb. 1927.

An earlier instance is that of the Fehrenbach Ministry: from the resignation of the Müller Cabinet, 8 June 1920, to the completion of the Fehrenbach Ministry, 27 June 1920.

[3] Cf. Letter from Cuno to President Ebert on his difficulties in forming a government, Nov. 1922: 'I accepted your invitation (to form a government) in the hope of creating a Cabinet, which would, in its composition, respond to the need for the capable conduct of affairs and would be supported by the confidence of the Reichstag. The necessary discussions with the leaders of the parties have shown that individual parties bring forward not only suggestions and wishes, but even projects and claims, concerning the number of Cabinet Ministers to be taken from the party, going as far even as mentioning persons, departments, indeed, whether a member of the previous Cabinet should take over some other department. With this all the presuppositions upon which a Cabinet appropriate to its technical tasks could be constructed fall to the ground. As little as I misapprehend the necessity for co-operation between Parliament and Cabinet, even in its composition, as much am I obliged to lay decisive weight upon this, that the choice of Ministers and Departments must be left to the judgement of him to whom the request for the formation of a Cabinet was proffered. As that is now impossible, I desire to give back to you the request to form a Cabinet,' etc., etc.

capture of administratively influential Departments, so that, sometimes, to save difficulty, non-party experts are given the hotly contested Ministries. What does this involve? It involves the consequence that the Chancellor's main lines of policy are established as much by his colleagues as by him—how much of the one, or of the other, depends upon the comparative strength in the Reichstag and the desire for office, and the power to injure if one remains in Opposition. Thus the Chancellor is partly the creature of the Ministers, and is always dependent upon them. Finally, though he nominates them, they possess the power to compel the nomination, and even decide the offices they shall hold.[1] Anschütz claims that this is in direct contradiction to the Constitution. He is quite right: the Cabinet system in Germany follows the party-system, not the Constitution.

Short-lived Cabinets. From February 1919 to June 1928, there were fifteen Cabinets, that is, each Cabinet lived for seven and one-half months. There are various reasons for this weakness. Of very great importance is the disturbing and uncontrollable effect of foreign pressure upon Germany. Every time a crisis has occurred in German foreign relationships the balance of political strength and loyalty has been rudely disturbed, since passions have been so roused that often one could best govern by resignation from the Government. Thus I count at least four Cabinet downfalls as due to unavoidable foreign events.[2] Another three defeats were due to the *malaise* of a new constitution: the Kapp-Putsch,[3] stringency of measures against Saxony and Bavaria,[4] a conflict over the National Flag.[5] Of the other eight Cabinets, four resigned when General Elections went against them.[6]

There are four yet to be explained. The first a Government of the Weimer Coalition: Social Democrats, the Centre and the Democrats fell after over a year of office (October 1921 to November 1922) owing to general weakness and the inability to attach to itself the party just on its Right—the German People's Party. The Chancellor, Wirth, of the Centre Party, was too uncomfortably placed to be able to pursue a steady policy without more support.[7] In the second of these Cabinets, Stresemann's Great Coalition, which included the pre-

[1] Cf. Anschutz, op. cit., p. 192; Freytag-Loringhoven, op. cit.

[2] The Versailles Treaty, June, 1919; the London Ultimatum in May, 1921; the Upper Silesian Affair, October, 1921; and the invasion of the Ruhr, August, 1923.

[3] Bauer Cabinet (19 June 1919 to 26 March 1920).

[4] 2nd Stresemann Cabinet (6 Oct. to 23 Nov. 1923).

[5] 2nd Luther Cabinet (26 Oct. 1923 to 13 May 1926).

[6] Muller Cabinet (27 March 1920 to 8 (21) June 1920); Marx Cabinet (30 Nov. 1923 to 26 May 1924); Marx Cabinet (3 June 1924 to 15 Dec. 1924); Marx Cabinet (3 Feb. 1927 to 12 May 1928).

[7] The Cabinet relied on the support of 225 members of the Reichstag; of this number 113 were Social Democrats, 45 Democrats, 67 Centre (the Chancellor's Party). The German People's Party was represented by 62 members. For a diagram of the Coalitions from 1919 to 1928, cf. Woytinsky, *Zehn Jahre Neues Deutschlands* (1929), p. 204.

viously-named parties and his own, the German People's Party, it was impossible to keep the parties together for more than seven weeks (August to 4 October 1923) as the Social Democrats refused to give the Government a free hand in matters of social legislation.[1] The third Cabinet to fall through Parliamentary weakness was the Luther Coalition of Centre Parties and German Nationals. This lasted ten months (16 January 1925 to 29 October 1925), but did not prove strong enough,[2] and a minority government in which the Democrats replaced the German Nationals took its place after six weeks of negotiation, only to fall four months later. The fourth Cabinet of this series was similar in composition to Luther's minority government of the Centre Parties and the Democrats, but with Marx of the Centre as Chancellor, lived from May 1926 to February 1927, that is, for seven months, dying as the result of a vote of no confidence passed by the Parties of the Right and the Left—the German Nationals and the Social Democrats.[3]

Now it cannot be denied that a permanent source of weakness lies in the number and smallness of German parties; and until there is any improvement German Cabinets must continue to suffer a precarious and short life. More, the whole democratic system is seriously endangered. The parties are, some of them, small and intransigent, they are captious and unwilling to surrender their narrow loyalty for the public good, Parliament is almost always in a state of serious internal disagreement, and often of uproar—how can it possibly secure the loyalty of the people, especially since they have been used to executive stability? Further, a coalition, once formed, has not finally overcome its digestive troubles: at any moment there may be a secession, and there is a continuous sense of the provisional nature of the settlement which provokes uneasiness among the people and an unwholesome spirit of aggressiveness and ambition in the opposition

[1] The Social Democratic Party opposed an increase of working hours per day—and withdrew their support from Stresemann who asked for discretionary power in economic, financial and social matters (2 Oct.). Cf. *Deutscher Geschichtskalendar*, 1923, II, 193, 194.

[2] The Treaties of Locarno concluded in October, 1925, caused the German National Party to retire from the Government. In the statement of the Party's position (on 29 October) dissatisfaction is strongly expressed: 'The work of Locarno has bitterly disappointed us.' Cf. *Deutscher Geschichtskalendar*, 1925, II, 315.

[3] 3rd Marx Cabinet (15 May 1926 to 3 Feb. 1927). This Cabinet was really defeated on 17 Dec. 1926, by the combined vote of the Social Democrats, German Nationalists, Communists and the *Völkische Arbeitsgemeinschaft* by 249 : 171. The Social Democratic Party voted against the Government on the ground that only a truly Republican Cabinet could ensure a thorough reform of the Reichswehr. The German Nationalists wished to see a more stable Cabinet with a clear majority—'for the sake of the country'. Cf. *Deutscher Geschichtskalendar*, 1926, II, 98, and Schreiber, *Politisches Jahrbuch*, 1927–8, pp. 74–6. The Chancellor Marx informed the Reichstag that the crisis would probably be long and he remained in office to conduct the business affairs of the Government during the time negotiations were taking place (i.e. 17 Dec. to 3 Feb.).

groups. Yet there are certain factors which give some hope that French experience will not be repeated in Germany: the first is that foreign shocks will not go on for ever; the second is that the Germans positively wish for Ministerial stability; thirdly, there is strong party discipline which forbids the secession of members of the group once a coalition has been entered; though on some occasions issues of foreign policy have seriously weakened the force of this discipline; and fourthly, the power of dissolution exists and has not been exhausted.

As to the last, a word or two may be said here. Article 25 of the Constitution says that 'the president of the Federation may dissolve the Reichstag, but only once for any one reason. The General Election will take place not later than sixty days after the dissolution'. The article was included to enable the President to intervene where the Government and the Reichstag were in conflict, and so give an opportunity to the people to settle a conflict by a decision between the old Government and its opponents in the House. I will not pretend that this intention was clear in the minds of the Constitutional Committee: it was not; they had muddled conceptions of strengthening or weakening the President and settling a 'conflict'[1] here obviously meaning a government in difficulties and perhaps unwilling to resign. There was no clear conception of a situation arising from such a balance of parties as to make government hardly possible.[2]

However, a tool may serve many purposes whatever its original intention. Dissolution had twice served the purpose of dissolving a Reichstag where the coalition of parties made governmental leadership impossible. The Reichstag was dissolved in March, 1924, a few months before its natural end, because the Reichstag had refused the Government the power of keeping in force certain 'vital' emergency orders. There had already been seven Cabinets in the Reichstag term, and neither majority nor minority governments had been able to live. The second occasion was in October, 1924, that is, about six months afterwards, since the elections had resulted in an impossible arrangement of parties. On this occasion the Presidential Order for a Dissolution said: 'Parliamentary difficulties make the retention of the present Government and at the same time the formation of a new Government on the basis of the domestic and foreign policy hitherto followed impossible.'[3] Then in July, 1926,[4] the President told the Chancellor that he had heard that the Cabinet was considering dissolution of the Reichstag and its own resignation in view of its difficulties with the Bill on the expropriation of the German Princes. He urged them to stand fast, as he was unwilling either to dissolve or to accept their resignations. This caused the pressure to be taken over to the Reichstag, and applied there in the name of the peacefulness

[1] *Sten. Ber.*, pp. 231, 251 ff. [2] Cf. Pöhl, *Die Auflösung des Reichstags.*
[3] Purlitz, *Deutscher Geschichtskalendar*, 1924, II (20 Oct.), 86. [4] Ibid., 1926, II, 1.

and continuity of foreign affairs and domestic policy in other fields. That is, by refusing a dissolution, which is recognized as a feasible outlet, a compromise may be produced ; for it is not certain that new elections would settle a matter where there are many parties. Similarly, in February, 1928, the President asked the Chancellor, during a crisis over the Education Act, ' to leave nothing undone to prevent a governmental crisis and its political consequences at the present point of time '. There were many things which needed immediate attention, and a fresh election would cause disturbance of this. The President therefore asked the parties to attempt to tide over at least the business of first-class domestic and foreign importance. It is quite obvious that the power to dissolve is used as a means for pressing forward the work of government, sometimes by means of dissolution, sometimes by its refusal or purposeful postponement.[1] Again, in 1930, the Brüning Government, in a minority, could not carry urgent financial measures ; no other government was possible owing to the parcellation and irreconcilability of parties, and therefore dissolution was unavoidable. The situation which resulted from the General Election was worse than that which had preceded it ; for the Extremes had increased their vote. However the perception of danger to the parliamentary system attached to the support of the minority government many who had voted against its measures.[2]

Continuity in Office and Membership of the Reichstag. There is rather a large rotation of office due to the rapid changes of Ministry. Some members appear in Cabinets again and again, and these acquire a large amount of official experience, but it is usually varied, and German practice is far nearer the French than the English in this respect. What effect this will have upon the bureaucracy is as yet to be seen.

Now the Constitution nowhere provides that Ministers must be members of Parliament. Article 33 gives the Reichstag and its Committee the right ' to require the presence of the Chancellor and any Federal Minister ' ; while, ' the Federal Chancellor, the Federal Ministers and Commissioners appointed by them, have access to the sittings of the Reichstag and its Committees. . . . At their request, the Government must be heard during debate.' Here is ample power to secure a due attendance of Ministers in the House. The arrangement makes it possible for Ministers to be chosen outside the circle of members of Parliament. There are undoubted advantages in this, providing the Cabinet is, for the large majority, from the body of the Parliament itself. It is not good to attempt to dispense too largely with the process of electoral and parliamentary training and selection. Even if this were not so, we can be sure that members of Parliament would not be prepared to relinquish claims to office. Now German political experience has been the experience of a nation governed by

[1] Cf. also Government's Declaration, 19 Feb. 1928. [2] Cf. Purlitz, 1930, June 30.

experts. That experience has not been forgotten, and it is not yet widely held to have been improper. On the contrary, it is generally agreed that expertness ought to find a place in the Cabinet. The result is that though the overwhelming number of Cabinet posts go to politicians, some very important ones go to non-parliamentary experts —in all some twenty-four Ministers out of about 150 (in fifteen Cabinets). Luther, for example, was twice Chancellor, Minister of Finance, Minister of Justice and Minister of Food, and even declared himself non-party. Cuno, another Chancellor, was not a member of the Reichstag. Finance, Food, Economic Affairs, Transport, the Post Office and the War Office, have been held by Ministers who were not members of Parliament. This device is used, not only to include men who have masterly administrative ability, but also to withdraw bones of contention from the negotiations for a coalition, for, at least, exception will not be taken to these men on the ground that some particular party is receiving an advantage.

Votes of Confidence. If we had not been taught that the living Constitution may be and is always very different from its written clauses, we might imagine that the German Constitution was wise in distinguishing the responsibility of the Chancellor and the whole Government from that of any one Minister, by providing that the Chancellor is responsible for main lines of policy and the Ministers for departmental policy, and that they must resign should the House withdraw its confidence by express resolution. We saw that Preusz desired the benefit of collective counsel without the disadvantage of a fall of the Government when any one Minister was to blame. Now it could have been prophesied that such system could not possibly work, because, having regard to English and French experience, no easy line can be drawn between main lines of policy and the departmental application thereof. We foresaw that it would be impossible, having regard to the close-woven texture of modern governmental business, and the conditions of Cabinet-making, for a Minister to be sacrificed without the Cabinet itself falling. These prognostications have been realized. Many votes of no-confidence have been proposed and some have done their fell work—but none has been directed against a single Minister: all have been levelled at the Cabinet. Some, but very few, Ministers have left Cabinets because their pet policies have not received furtherance, because foreign events have occurred with which they did not wish to be officially associated. But individual Ministers have not been attacked by express resolution; Cabinets have stood or fallen together.

What, then, has been the nature of the votes of Confidence? It is agreed among Constitutional lawyers of repute,[1] that the Consti-

[1] Poetzsch-Heffter, op. cit., p. 168, and *Handkommentar*, p. 262 ff.; Anschütz, op. cit., p. 190.

tution means that a Government possesses the confidence of the Reichstag until this is 'withdrawn'. The Government may, it does, but it need not, ask for any express vote of confidence upon entering office.

Now it is clear that there are degrees of confidence and no confidence. The Constitution says that Ministers must go if there is an '*express* resolution withdrawing confidence'. We who are tactful know that mistrust may be conveyed without the use of explicit terms; we also know that we may avoid the expression of no confidence, and yet safeguard ourselves by not voting in positive favour of a resolution of no confidence—for from such a vote it does not follow that we *positively* have confidence. Parties in the Reichstag, therefore, who do not wish to overturn a Government, but who are strong enough to do so, may and do vote against a resolution of no confidence, without considering that they support the Government, and with involved explanations to their constituents that they do or do not partly or wholly trust the Government. Another method of parliamentary trimming is to give a 'limited' vote of confidence: that is, assent to one or more activities or to policy for a specific time. This form of vote of confidence has become very frequent owing to the changing relationship of groups and governments. It enables the parties to injure and weaken the Government by substituting 'limited' for full confidence, and then dishonestly to explain away their position to electors who cannot follow whether their action was right or wrong in the circumstances. The President of the Reichstag, Löbe, has suggested that the term '*billigen*', which means no more than 'to accept', ought not to be used alone to indicate acceptance of a Government declaration without the addition of a definite statement of confidence.[1] He believes it would be good to have the French practice, where the Government declares that it stands or falls by the voting of a majority for a resolution which it designates. It this way there is a positive and explicit expression of opinion within the terms set by the Government. To me, this seems a very reasonable suggestion.

Must the Government resign if the majority does not vote expressly *for* a positive resolution of confidence in the Government? To abstain from voting, or to vote against, is not an *explicit withdrawal* of confidence. Only once (Stresemann, in November, 1923) has a Government resigned on the rejection of an affirmative vote of confidence, but that is the only occasion upon which such a vote was rejected; and on that occasion the Chancellor had directly challenged a clear vote. Many votes of No Confidence have been put by the opposition groups, but only two were accepted, and these led, of course, to the fall of the Cabinets involved.[2]

Beyond what we have already said, Governments resign, of course,

[1] *Vorwärts*, 10 July 1928. [2] Luther, 12 May 1926; Marx, 17 Dec. 1926.

when their Reichstag difficulties make progress with their policy impossible. Their fall is promoted also by differences between Ministers.

A country may thus have all the devices suggested by experience inscribed in its Constitution, but if it have not the social arrangements or the tradition, then the Constitutional clauses remain only as permanent expressions of cynicism. Yet the Constitution has chosen the way of civil peace; and men's natures may one day reach its level.

The Process of Law-making. German Cabinets face a rather more involved process of legislation than those in England and France, for, though the Reichsrat has no immediate power of obstructing legislation, it has a strong position.[1] That is not all, for the Constitution has provided that bills of social and economic importance must go before the Economic Council. What procedure, then, does the Cabinet follow? It is regulated by the 'General Rules of Procedure of the Reich Departments,—Special Section'.[2] Sessions of the various bodies, for example, are so arranged as to make it possible for the Ministers, their administrative assistants, and the necessary documents and resolutions, to go before the Assemblies at the convenient and proper times. The departments which prepare bills and important Orders are formally expected to consult vocational and expert groups, allowing these sufficient time to consult their sub-groups and to form and state an opinion. The representatives of the States, in the Committees of the Reichsrat, must be consulted during the preparations for the drafting of bills; and some decision has to be reached how far such representatives are to be informed of inter-ministerial differences. In any involved process, where different bodies participate, the prospects of maintaining secrecy until the matter has reached a point when it is ripe for public discussion are small; and the Rules guard against untoward publicity. Ordinary Bills go first to the Reichsrat, the Federal Council; if they are bills of social and economic importance they should go first to the Economic Council, and at least, such bills must go to the Economic Council simultaneously with the Federal Council. If the Economic Council is consulted first, its reports are to be put before both Federal Council and the Reichstag; if not, then its reports only appear before the Reichstag. If the Government contemplates amendments arising out of the Economic Council's suggestions the Cabinet discusses the subject and submits its decisions to the Federal Council before they appear in the Reichstag. When these two Councils have examined the Bill and their suggestions and amendments have been met, affirmatively or negatively, by the Government, the resultant project goes to the Reichstag. Where the Federal Council's observations could not be met, the Government is obliged to

[1] Cf. Chap. X, *supra*.

[2] '*Gemeinsame Geschaftsordnung der Reichsministerium,—Besonderer Teil.*'

state what they were and why they were rejected. Then, again, the Federal Council has a power of initiation; and its results must either be supported or rejected by the Government in the Reichstag. Finally, the Federal Council has the right of challenging any Bill passed by the Reichstag within a fortnight after its passage. Arrangements are made for bringing such bills to the notice of the Reichsrat, and it is incumbent on the Minister to secure a conference between members of the Reichstag and the Reichsrat in the Committee which considers the matter. Important Statutory Rules and Orders undergo a similar process of discussion by the three bodies.

The Referendum. One other subject deserves mention. A Government may find itself suddenly called upon, in the course of its general duties and preoccupations, to face a Referendum on a subject which may seek to force its hand in an item of policy it is already pursuing, or in a subject where party difficulties make a decision impossible. What attitude does the Government assume? On the occasions when a Referendum has been invoked the Government has been obliged vigorously to defend its own policy, which is naturally a policy made by a compromise between a number of parties. Either from the extreme Right (the Young Plan Referendum) or from the extreme Left (the Princes' Expropriation Referendum) the initiative has come: that is, an extremer policy than the Government was prepared to undertake has been proposed; and so far a Referendum has not been won. The Government, however, has naturally been embarrassed, for the propaganda at the Referendum was very violent and scurrilous; and for a short period the Cabinet was weakened by doubts, challenges from the Reichstag and the constituencies, and the general restlessness of the country. Those parties support a Referendum which have suffered at the previous elections. Internal differences are provoked by the Referendum campaign, and the parties at the base of the Cabinet are also in a state of unrest. Nor has the Referendum made any real difference to Cabinet policy; the Young Plan was carried through, while the Princes' Expropriation Bill fell; it would have fallen even had there been no Referendum. The future has yet to show us what will happen when a Government is faced with a successful Referendum, which vitally touches the policy of any one of the Cabinet groups. A Referendum could hardly be carried against a newly elected Parliament and newly constituted Cabinet.

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GENERAL SURVEY

The analysis of the Executive brings to light certain truths. It is obvious that a non-responsible government is impossible and dangerous, save for exceptional moments in the life of the modern state. Responsibility to some body representative of the people is needed as much

for the well-being and capacity of the leader as for the enforcement of a sense of responsibility. Loss of office is, in the Western World, at least a sufficient sanction of responsibility, while impeachment, and civil and criminal liability, are either unnecessary or too grave to be used. Responsibility of this kind admitted, the problem becomes one of finding the best conditions of centrality in leadership, and the two chief methods are the Parliamentary Cabinet and the Non-Parliamentary President. There is every reason to believe that the Parliamentary Cabinet is far superior to the Presidential system; indeed, the latter has nothing which can be urged in its favour except the very devices which are intended to overcome its inherent defects. It is possible to concentrate to such a fine point that all the benefits of collective counsel backed up by the weight of a political following are lost. On the other hand, in the French and German Cabinet systems, Parliamentary Committees dispute executive leadership, and contribute to the obscurity of responsibility, and this, if possible, is to be avoided, as it is in the British system. Modern Cabinets are overburdened, and to meet their obligations they use expert commissioners to help them in debate and explanation, expert technicians, either in the form of a Council, or as individual attendants upon the Cabinet, and their rules of business are more and more being adapted to the complexity and intricacy of their work. Not all of them are as rationally organized as is necessary. Collective responsibility, rather than individual responsibility, is an almost inevitable consequence of the inseparable weft of all government business, and the vital importance of each part of a Government's policy to the rest, and besides this, indubitable indication of responsibility is only possible where a unit confronts the Legislature and the People.[1]

The sources of healthiness or unhealthiness in Cabinet government are to be traced to the Party system, for this connects the Government and the Parliament, and the Government and the People, and the Government and the Opposition. Of all the systems we have analysed, by good fortune and the predominance of political ability over other spiritual dispositions, the English have produced the best. In other countries representative government in general (and the parliamentary executive in particular) has fallen into contempt, in some it runs the serious risk of replacement by a dictatorship, in a few, it has already been replaced by dictatorship,[2] because the fragmentation and number of parties, and their mutual intolerance based on grounds of policy or personal egotism, results in a most disturbing instability of the executive. This experience provides a fresh criterion of the Non-Parliamentary Executive of the U.S.A.—for, at least, whatever the shortcomings of that system, the executive is fixed for four years, and, in

[1] Cf. especially Chap. II, *supra*.
[2] Italy, Jugoslavia, Austria and Poland.

the modern world of highly sensitive industrial, commercial and financial human relationships, based upon continuity of operation, credit and meticulous calculation of the future, stability is a tremendous advantage. A moment's consideration of the effect on industry of taxation, tariff and employment policy will teach that.

Yet the Executive, as we have treated it, lacks the final touch, that is, an understanding of the part which the Chief of State plays in the process of Government. We have already indicated that the members of the Cabinet, especially the Prime Minister, attract loyalty by reason of their high status as well as by their utility. They are credited with being more than they are because they are where they are. We shall see that men and women defer even more to Presidents and Kings, even when these are in fact able to do far less than that with which they are credited.[1]

[1] We ought not to leave this chapter without a few words on the Cabinet System of Prussia. It is established and regulated by Articles 7, 24, and 44-59 of the Constitution.* 'The Ministry is the supreme executive and directing authority of the State.' The Prime Minister is known as the Minister-President. The Diet chooses 'not explicitly' (*ohne Aussprache*) the Minister-President, and he appoints the other Ministers. Naturally this process has been settled by the results of the elections, the state of political parties and circumstances—all as in the Reich. The Constitution attempts the division of responsibility for general policy and departmental policy as in the Reich. As there is no President, apart from the Minister-President, the Cabinet represents the country in foreign relations (but it has hardly any foreign relations in the real sense of the word); it possesses a right to initiate legislation, to make rules and orders, appoints officials, exercises the prerogative of pardon, and makes orders to cope with 'extraordinary conditions of emergency'. The Cabinet or any individual minister can be overthrown by an express resolution of the Landtag; and to such a resolution at least one-half of the membership of the Landtag must assent. Ministers can be impeached by the Landtag before the High Court of State.

The Cabinet, since 1918, has been subject to all the shocks of party vicissitudes: from November, 1918, to April, 1925, there were six different governments, taken, however, from combinations of parties of the Left. Since 1925 there has been one Minister-President, Braun, a Social Democrat, who has led a coalition of Social Democrats, Centre, Democrats, and one non-Parliamentarian. It was against this government that the National-Socialist Referendum of 1931 was levelled.

* Cf. Waldecker, *Die Verfassung des Freistaates Preussen* (2nd Edn.).

CHAPTER XXVI

THE EXECUTIVE: CHIEFS OF STATE: KINGS AND PRESIDENTS

IN the previous chapter we explained that the executive branch of government was principally in the hands of an elected person or body of persons: in America, the President; in England, France and Germany, the Cabinet; but we also pointed out that there are other functions appertaining to the executive which, at the present moment, lie outside the scope of these bodies and are carried out by Kings or Presidents. In this chapter we describe these functions, and explain why the full scope of executive power is not exercised by Cabinets responsible to Parliament and to the people.

In the last century-and-a-half the Chief of State has emerged from the historical struggle between absolutism and democracy. Certain events have prevented the narrow absorption of executive powers by one single body, whether a single person like the President of the United States or collective bodies like Cabinets. In countries other than England, where Presidents have been established, it was thought with some deliberateness and definiteness of perception to concentrate national loyalty by creating a single chieftain, that is to say, something conspicuous and very definite to the view by reason of the extreme simplicity of unity. To this simplicity and conspicuousness must be added a certain inkling that the exaltation of an institution induces a loyalty which is given, not so much to the person who occupies the institution, but to the institution itself. It is an everyday experience that when an ordinary person is given extraordinary status the mass of people begin to believe that the talents of the man are of the magnitude of the office. In the State a convention is established that such-and-such an office is pre-eminent, standing above all, and acting as a symbol of social unity.

THE BRITISH MONARCHY

The previous chapters made it clearly apparent that the main engines of politics lie in the electorate, in the political parties, in Parliament and the Cabinet. Yet Great Britain is legally—if we stretch the term 'legally' to its thinnest and most formal of meanings

—a monarchy. But the commonest description is, a constitutional monarchy. What does this mean? When we talk of the actions of the Crown in politics we mean that the people, Parliament and the Cabinet have supplied the motive power through the formal arrangements established by centuries of constitutional development. The Crown is the ornamental cap—over all these effective centres of political energy. We mean not the person of the Crown—not the King or the Queen—but the institutions which borrow, or act in, the name of the Crown. As a person the monarch has been bereft of almost *all political power: of initiative and discretion in public policy the* King has practically none. The double meaning of 'the Crown' need cause no difficulties of understanding, for it is clearly possible that people, Parliament or Ministers shall supply the motive power and discretion, and then, when consummating a particular political act—making law, or employing officials, or inspecting factories—to borrow the symbol and the name of the Crown, while allowing the incumbent of the office—the actual person on the throne—no share at *all* in the creation of their policy. Or, in other words, it is possible theoretically to arrange that a certain person shall be no more than a figurehead, a rubber stamp, an instrument of signature. However, in practice, we must ask whether it is possible for a person to be kept in such a position, and whether these phrases accurately represent the position held by the Crown at the present day.

It is broadly true that since the accession of William of Orange the Crown has approximately the status of a rubber stamp and a figurehead. For the constitutional conflicts which led to the downfall of the Stuarts were not to prevail unless its Ministers were ready to take responsibility for the rightness of that will, and unless the Ministry could secure the continuous confidence of Parliament. By 1688 it had been settled that parliaments should be regular, while a dynasty had been overturned, and a new one made by a revolution. The Bill *of Rights settled certain fundamental principles which bound the will* of the monarch [1]; further, a distinction was made between the royal and the national revenue,[2] while later on an annual fixed sum was made payable to the King, whose hereditary revenues were given up.[3]

[1] The Bill of Rights (1 Will. & Mary II, c. 2 (1689)) declared illegal (1) the suspension or execution of laws by royal authority without consent of Parliament, (2) the 'levying of money for or to the use of the Crowne by pretence of prerogative without grant of Parlyament for longer time or in other manner than the same is or shall be granted', (3) the raising or maintenance of a standing army in time of peace without the consent of Parliament.

[2] 9 & 10 Will. III, c. 23 (1688).

[3] Subsequent Civil List Acts removed 'civil' charges from the List; at the same time the hereditary revenues were gradually ceded. Important stages in the latter process are marked by the Acts of 1760 (1 Geo. III, c. 1), affecting the hereditary revenues of England, and 1830 (1 Will. IV, c. 25), ceding those of England, Scotland and Ireland.

Thus, as the phrase goes, 'the Crown was made, the Crown was limited and the Crown was paid'.

The essence of this constitutional revolution was for long not registered in actual fact; although the Bill of Rights was established in 1689, Dunning's resolution in the House of Commons [1] a century later clearly showed that George III was exercising an influence upon politics as visible as it was effective. The memoirs of the time and the correspondence between the King and his Ministers show quite clearly, that, for a large part of his reign, George III was his own Chief Minister and that, realizing that since the Revolution authority did not lie with him, he understood very well how to use money and social influence to control the real sources of authority, namely, the people and Parliament. Royal interference was then and until the end of George III's reign the normal situation. Nor was it until the reform of 1832 that the period of royal predominance came to an end. When William IV agreed, after much friction with his Ministers, to create sufficient peers to swamp the House of Lords if they dared to reject the Reform Bill a second time, the essential gains of the revolution of the seventeenth century were indubitably registered, and that date marks a period.[2] The monarchy since that time has never had a tithe of the power which it claimed, and even possessed, before. However, the reigns of Victoria and Edward VII show that when we speak of the Crown as an institution we must include in it more than the people, Parliament and the Cabinet—we must include a portion of influence which is not contested, contributed by the person of the monarch himself. Not that that contribution is large, at the present time, or even that it is anything like as pervasive and important as it was even at the accession of Victoria. Compared with the generally recognized power exercised by the Cabinet, that of the monarch is almost inappreciable.

The Actual Powers of the Crown. Let us consider, now, in some detail, the extent to which the Crown is concerned in government and let us for the sake of easy exposition take the three branches of government, namely, judicial, legislative and executive.

The Courts of Justice are His Majesty's Courts of Justice, the Judges are His Majesty's Judges, but, in practice, in no detail whatever does or can the King interfere in the course of justice. The King does not appoint judges, he does not dismiss them.[3] The procedure

[1] Cf. Dunning's resolution in the House of Commons, 6 April 1780, *Parl. Hist.*, XXI, 347. 'That it is the opinion of this committee, that it is necessary to declare, that the influence of the Crown has increased, is increasing, and ought to be diminished.'

[2] Cf. Trevelyan, *Lord Grey of the Reform Bill* (1920), pp. 276–9; Parker, *Life and Letters of Sir James Graham* (2 vols., 1907), Vol. I, Chap. VI.

[3] Judges of the High Court 'save the Chancellor are appointed by letters patent under the Great Seal on the advice of the Chancellor' (Anson, Vol. II, Pt. II, p.

of the Courts of Justice is settled by Parliament and the Courts.[1] The King cannot interfere in the process of prosecution, trial, sentence and the other incidents of the administration of justice.[2] In regard to crimes, of course, the trial takes place in the form of *Rex v. John Doe*. But this means no more than the United States in *U.S.A. v. a Defendant* or the People in the *People v. a Defendant* or the Commonwealth in the *Commonwealth v. a Defendant*, terms used in certain republics from which monarchical forms and manners have been expelled. In one branch only of the administration of justice do we still see a vestige of the royal authority, and that is in the prerogative of mercy, the right to pardon those who have already been tried and sentenced.[3] This prerogative itself is exercised through the Home Secretary,[4] but in pursuance of a convention that the Crown should be informed of the things to which it is expected to append its signature, the Crown has exercised the right to question the advice tendered by the Home Secretary. Queen Victoria, for example, on several occasions remarked upon the undue severity or lenity of a sentence, being most severe, perhaps, when a man who attempted to assassinate her was judged to have been insane.[5] On several occasions Edward VII expostulated with Home Secretaries in cases of murder.[6] In 1920 appeals were made to King George V for the reprieve of the Lord Mayor of Cork, who was on hunger strike, but though those appeals were very urgent and so worded as to suggest that the King actually had the power to take a decision other than that made by the Home Secretary, it was made known in unmistakable terms that the Crown did not possess this power at all -that all responsibility lay with the Cabinet.[7]

268) They 'hold office during good behaviour but may be dismissed on address of both Houses of Parliament'.

'In the appointment and removal of County Court Judges . . . he is not expected to take the King's pleasure . . he acts independently of the Crown' (ibid., Pt. I, p. 153).

[1] E.g. Common Law Procedure Acts and Judicature Acts of 1873 and 1875.

[2] Cf. Halsbury, *Laws of England*, VI, 399: 2, Co. Inst., 187; 4, ibid., 71.

[3] In 1535 this right was vested in the sovereign to the exclusion of the House of Lords (27 Hen. VIII, c. 28).

[4] By the Act of 1837 (7 Will. IV & 1 Vict., c. 77) the Queen was relieved of the duty of revising capital sentences which were reported to the Sovereign by the Recorder. The Home Secretary was appointed to exercise the royal prerogative.

[5] Cf. *Harcourt*, I, 397: '"The Queen is afraid from the number of remissions sent her", writes Ponsonby to Harcourt from Balmoral (17 Nov. 1880), "that you are treating offenders with too great leniency, and commanded me to call your attention to this." Her Majesty demanded a return of the number of remissions signed by her in the last six months and in the previous six months. It was apparent that she intended to judge Harcourt's action by that of his predecessor Cross.'

[6] Cf. Lee, *King Edward VII* (2 vols., 1927), II, 39–43.

[7] Cf. *Times*, 26 Aug. 1920, for Mr. Redmond Howard's telegram to His Majesty and for the King's answer and for the Prime Minister's (Lloyd George's) statement; *Times*, 27 Aug. 1920, where a news agency states the King's position: 'The King took immediate action in the case of the imprisoned Lord Mayor of Cork, as promised by Lord Stamfordham, his private secretary. The action was to consult with his

Let us now consider broadly the Crown in its legislative aspects. The King opens and dissolves Parliament.[1] If the discretion whether and when Parliament should be opened or dissolved really lay with the King alone this power would be tremendous, for it would be nothing less than a power to deny the right of the people themselves to determine who should make the laws and when they should be made, and it could destroy for years the Cabinet's parliamentary basis. In fact, Parliament must automatically be called year after year because it is necessary to vote supplies and provide for the discipline of the Army.[2] Further, the total length of the life of a parliament is determined by statute—at present by the Parliament Act of 1911. And, finally, Parliament itself decides its own sessions.[3] There is no way in law whereby the King can open or dissolve Parliament without the initiative and the motive power coming from sources outside himself, though in regard to dissolution, we shall presently make a qualifying reference.

It is a convention of the British Constitution, supported by a standing order of Parliament,[4] that the Crown asks for money, that all revenues are granted to the Crown and to the Crown alone. This is merely an arrangement to throw the full and exclusive responsibility for finance upon the Cabinet and to make it impossible for private

responsible Ministers. His Majesty, true to his constitutional position, would not exercise his prerogative of clemency in a case of this kind without consulting his Ministers, and the position this evening was that the policy of the Government remained unchanged. The view in Government circles is that the offence proved against the Lord Mayor of Cork is too grave to justify his release merely because he declines food, and that the matter of bearing or increasing the penalty is in his own hands.'

Cf. also *Times*, 31 Aug. 1920, for a communication from Mr. Balfour to a correspondent on the subject:

'You ask me what is the constitutional practice with regard to the exercise by the Government of the prerogative of mercy. The practice is quite clear and is in accordance with accepted constitutional principles. The prerogative is exercised on the advice of Ministers. For that advice they alone are responsible. If it be mistaken they alone are to blame. To them, therefore, and only to them does it seem proper to address censure or praise, encouragement or remonstrance. The Prime Minister acted with perfect constitutional propriety when, in respect to a case which is now exciting much interest, he publicly explained on behalf of himself and the Government the course which in the general interest he deemed it necessary to pursue.'

[1] Anson, op. cit., Vol. II, *The Crown*, Pt. I, p. 44: 'He summons, prorogues, and dissolves Parliament . . .' Cf. Pollard, *The Evolution of Parliament*, Chap. XIII, for the history of the 'crown in Parliament'.

[2] The first Mutiny Act (1689) and the Bill of Rights provided that a standing army could only be maintained in time of peace by consent of Parliament. It soon became a settled practice to pass a Mutiny Act for one year only (cf. Maitland, *The Constitutional History of England* (1908), pp. 329, 447). Annual Mutiny Acts were passed until 1879 when a new type was enacted. In 1881 a 'new edition' of this act provided for the discipline of the army. By s. 2 of the Army Act (1881, 44 & 45 Vict., c. 58) annual renewal of the law is required. Hence the Army (Annual) Act which necessitates the meeting of Parliament.

[3] Cf. May, *Parliamentary Practice*, pp. 58, 59.

[4] S.O. 66.

members of Parliament to suggest increases of expenditure.[1] The Crown has no longer independent sources of revenue, and consequently it would be absolutely impossible—so impossible as to make it almost absurd even to consider the question—for the Crown to secure revenues adequate even to a few hours' public expenditure without action through the proper constitutional channels. It might be possible for the Crown to exercise influence on the development of policy by the mention of its name in debate, but the rules of procedure of the House of Commons and House of Lords rigorously exclude this.[2] When George III found himself at loggerheads with the Ministry, mention of his name and inclinations in debate resulted in a realignment of parliamentary forces and a reconsideration of policy in favour of the Crown. It was threatened, for example, that those people who were known to have voted against the wishes of the Crown would not be received in the Drawing Room.[3] Similarly, during the conflict over the Reform Bill of 1832 the Crown's wishes were used to overcome opposition to the measure in the House of Lords.[4] This is now definitely excluded and there is no doubt that, were it not, Parliament would be influenced (though to what extent it is difficult to say), for there is still so much deference to the social situation of the Royal Family and to all that that situation comprehends in terms of distant but concrete economic and imperial interests, that many members would be deflected from their otherwise independent attitude.

The Veto Power. The Crown's assent to bills which have been passed by the House of Commons and the House of Lords is necessary to make them valid statutes. Can the Crown refuse its assent?[5] It has not been refused since 1707; and one of the conventions of the

[1] Cf. Durell, *Parliamentary Grants* (1917).

May, *Constitutional History*, I, 247: 'While the Civil List has been diminished in amount its relief from charges with which it had formerly been encumbered has placed it beyond the reach of misconstruction. The Crown repudiates the indirect influence exercised in former reigns and is free from imputations of corruptions. And the continual increase of the civil charges of the Government, which was formerly a reproach to the Crown, is now a matter for which the House of Commons is alone responsible. In this, as in other examples of constitutional progress, apparent encroachments upon the Crown have but added to its true dignity, and conciliated more than ever the confidence and affections of the people.'

[2] Cf. May, *Parliamentary Practice*, pp. 320, 321: 'The irregular use of the King's name to influence a decision of the House is unconstitutional in principle and inconsistent with the independence of Parliament. Where the Crown has a distinct interest in a measure, there is an authorized mode of communicating His Majesty's recommendation or consent, through one of his Ministers.' The principle was asserted in a Commons' resolution of 17 Dec. 1783 and reaffirmed by decisions of the Speaker on 26 Feb. 1808, and 19 May 1843. In the House of Lords complaints were made of the use of the Prince Regent's name in debate on 19 March 1812.

[3] Farrer, *The Monarchy in Politics* (1917), pp. 43, 44. The threat was made in a letter to Lord North (14 March 1772, North, *Letters*, I, 97).

[4] Todd, *Parliamentary Government*, I, 71.

[5] Cf. Dicey, *Law of the Constitution*, p. 25: 'To the conventions of the constitution belong the following maxims: "The King must assent to, or (as it is inaccurately expressed) cannot veto any Bill passed by the two Houses of Parliament. . . ."'

Constitution is that the Crown cannot refuse. In short, in regard to laws which have duly passed through Parliament the Crown is merely an automatic rubber stamp. Now this convention has not been entirely unchallenged since 1707. The Crown has several times threatened to use the veto power if its policy were not adopted.[1] These threats, however, were made a good many years ago. The veto power has on occasion been used by Ministers themselves who, driven to the last extremity of vindicating their policy against the criticisms and even censure of the Crown, have challenged the Crown to use its veto power, saying in effect, 'I intend to carry my constitutional right of introducing the legislation I wish, and the only remedy that you have, if you think it is a remedy, is not to accept the law once Parliament has made up its mind on the question.'[2]

A much more serious revival of the authority of the veto power was suggested by members of the Unionist Party during the excitement aroused by the Home Rule Bill in 1913–14. It was urged that the royal veto power was not dead, but that the Crown had a right to assure itself that the Home Rule Bill was supported by the majority of citizens, in other words, that the Bill should not receive assent, and that the Cabinet should therefore be compelled to appeal to the people for a decision.[3] But it seems obvious that the institution of

[1] George III resisted the proposed clause of the Mutiny Act (1807) admitting Catholics in England to hold commissions in the Army. George IV not only threatened to use the veto but stipulated that Canning should accept office (April, 1827) on condition that the Catholic question should not be raised (cf. Farrer, op. cit., p. 122). In February, 1859, Queen Victoria declared her 'firm determination not to sanction under any form the creation of a British army, distinct from that known at present as the Army of the Crown' (Malmesbury's *Memoirs*, II. 154. Cited in Farrer, op. cit., p. 203).

[2] Queen Victoria opposed Lord John Russell's policy of intervention in Italian affairs in 1859. Russell (Foreign Secretary) replied: '. . . he must offer to Your Majesty such advice as he thinks best adapted to secure the interests and dignity of Your Majesty and the country. He will be held by Parliament responsible for that advice. It will be always in Your Majesty's power to reject it altogether' (*Letters*, III. 472).

[3] Cf. Wallas, *Our Social Heritage* (1921), Chap. X, pp. 227, 228: Speech of Bonar Law, Leader of the Conservative Party, at Edinburgh, 24 Jan. 1913 (*Times*, 25 Jan. 1913). 'Suppose the Home Rule Bill, which involves as you know the use of British troops to drive loyal men out of our community—suppose that Bill had passed through all its stages and was waiting for the Sovereign to decide whether or not it would become law. What then would be the position of the Sovereign of this country? Whatever he did, half of his people would think he had failed in his duty. If he refused to give his assent to it the whole Radical Party would be yelping at his heels on the ground that it was withheld in an unconstitutional way; if he did give his assent to it, then one-half of his people would say he was giving his assent to a vital measure of which half the people did not approve, and that in such circumstances the assent ought not to be given.'

Lord Halsbury said, on 5 Nov. 1913 (*Times*, 6 Nov. 1913): 'It was said that the King's veto was abolished two hundred or three hundred years ago. . . . It is all nonsense to talk about the King's veto being abolished. He did not assent to that argument. He was of opinion—and he apologized for saying so—that it was part of the British Constitution that if something was to become law and to bind their liberties that something must be assented to by the King, Lords, and Commons.'

monarchy itself would necessarily be threatened if the people had to choose between the Cabinet of the day and the will of the Crown. Now we have shown sufficiently in other chapters how the need produces the doctrine, and that when people are exceedingly excited by an attack upon what they consider to be their highest good, they are willing, in the name of an entirely new doctrine, to overthrow age-old principles and thrones. Consequently, although we may say that since 1707 the veto power has not been used, and has on the whole been considered an unemployable instrument, while the Crown exists and while the right exists actually to endorse bills with *Le Roy le veult*, there is always the possibility that in times of excitement and acute political conflict it will be re-invoked. Whether the Crown would survive such action would naturally depend upon the nature of the emergency which called it forth. That which is unconstitutional when it is unsuccessful, is often baptized as constitutional when it succeeds.

The Executive Powers of the Crown. The Crown is concerned also with what we have already termed the executive branch of government. We have described the connexion between the Crown and its Ministers, and broadly the results of our discussion in the last chapter were these: that though the Crown appoints Ministers, who shall be appointed is decided by the condition of parties, and by the relative political strength and reputation of the leading members of the majority party, and that by the device of counter-signature these Ministers take responsibility for every action of the Crown which may be deemed political. We also discussed the question of dismissal of Ministers, and we saw that they remain in office until they lose the confidence of the House of Commons or until they feel that it is impossible to carry on government properly with the existing distribution of party strength in the House of Commons. It is not constitutional for the Crown to turn out a Ministry at its own will.[1] Is it constitutional for the Crown to refuse a Prime Minister's advice to dissolve Parliament? If not, the Prime Minister has a great reserve of power against his colleagues and the opposition. The prevailing, though divided, opinion says No. lest, otherwise, the party policies of the Ministers who ask to resign and the Crown and any advisers, private or otherwise, who may have urged it not to assent to the request, come into conflict.[2]

Foreign Affairs. There is one branch of the Executive which,

[1] The classic precedent is the dismissal of Melbourne in 1834 by William IV. The King was alarmed by the Reform Ministry and its projects, after consulting the Opposition, which was in a large minority. Wellington took office until Peel could return from Rome, and when Peel assumed office he declared *his responsibility for the King's action* (!); as if he had himself advised it. (Cf. May, *Cons. Hist.*, I, 120 ff.) Of course Peel was defeated in Parliament, and Melbourne had to be reinstated.

[2] Cf. Laski, *The Position of Parties and the Right of Dissolution* (Fabian Tract, No. 210). Cf. Marriott, op. cit., Vol. I.

under Victoria and Edward VII, was considered to be a peculiar province of the personal influence of the Crown: foreign policy. Queen Victoria's letters and the biographies of her Ministers are full of her interventions to influence the course of English foreign policy. Suggestions, exhortations, reprimands, elaborate argument, all issued in a tremendous spate from the pens of Queen Victoria and Prince Albert, sometimes with effect and sometimes without. During the first part of her reign Queen Victoria was partnered by a man of exceptionally strong character, Prince Albert, whose views on the influence of the monarchy were these: that the sovereign should be,

'if possible, the best-informed person in the empire as to the progress of political events and the current of political opinion both at home and abroad, . . . Ministers change, and, when they go out of office, lose the means of access to the best information which they had formerly at command. The sovereign remains, and to him this information is always open. The most patriotic Minister has to think of his party. His judgement, therefore, is often insensibly warped by party considerations. Not so the constitutional sovereign, who is exposed to no such disturbing agencies. As the permanent head of the nation he has only to consider what is best for its welfare and its honour and his accumulated knowledge and experience, and his calm and practised judgement are always available in council to the Minister for the time without distinction of party.'

Nor did Queen Victoria ever forget the lesson which Prince Albert taught her, for her personal interventions in foreign policy to the very end of her life were incessant.

It was for years suspected that Edward VII was being used as an auxiliary ambassador in Anglo-Continental politics, and though it was officially denied, the recent works of Earl Grey,[1] and others, the biography of Edward VII by Sir Sidney Lee,[2] and the *Memoirs* of Prinz von Bulow show quite clearly that popular suspicion was quite true to the facts. King Edward enjoyed the work, for which he had the capacity, and his Ministers used him for it. No one could say that in that particular régime the King was a nonentity. This did not always have good effect. There were occasions, as for example in 1906, when the services of Edward VII in securing the *entente* with Russia and the subsequent visit of the Czar to this country gave rise not merely to the criticism of an Anglo-Russian *entente*, but led, as could have been prophesied, to the criticism of the person of the King himself for fraternizing with the representatives of a despotism.[3]

If, then, the customs and the statutes of the Constitution do not permit the King as a person to be much more than an agent of Ministers who take the decisions and accept all the responsibility, what is the

[1] Cf. *Twenty-five Years*, Vol. II.
[2] Cf. Lee, *King Edward VII* (2 vols., 1927), II, 125, 166, 221, 260, 292.
[3] Ibid., p. 691.

position occupied by the Crown? Broadly, it has no political power; and yet in Bagehot's phrase it has 'the right to be consulted, the right to encourage and the right to warn'. Put in much shorter terms, the Crown has the right to be kept informed of the political situation at home and abroad and to converse with its Ministers. Since the signature of the Crown is necessary for statutes and many other official documents, the Crown is in the position to demur, to make objections, to offer suggestions, to put the Minister in the position of offending it, or, if he does not wish to offend it by abruptly ignoring its ideas, to explain himself at length, to persuade and placate, and sometimes to make concessions. When we consider the prestige attaching to the Crown, the elements of mystic magnificence which reside in its long history and hereditary situation, when we consider also that it is for some people an elemental part in their conception of patriotism, we can easily understand that the Crown is not to be slighted. In short, its position does make it a force—a force which can be overcome by a man of strong character, but to which a man of some generosity and perhaps some weakness, a person of normal conviviality, may succumb—we do not say in really important matters, for to give way in those would be at once to lose political strength; but in matters not of first-rate importance the Crown's will may have its way.

We do not wish to stress this too much and make more of the power than is really there, but, at any rate, one can discern three elements which co-operate to secure to the Crown some power: the allegiance of the people, the personality of the King or Queen, and the personality of Ministers.

The People and the Crown. The allegiance of the people may, if it is strong enough, confront a Cabinet's mind with a large body of intimidatory influence. No Cabinet would lightly affront a people strongly loyal to the Royal Family. How far such loyalty would go in a contest between a Cabinet and the Crown we shall, perhaps, never be able to gauge, but the knowledge that the Crown is a popular institution is one with which, in times of conflict, a Minister must reckon, and he is not likely, at any rate on small points, to affront the Crown when that means to affront a very large proportion of the electorate. Now there was a time when the loyalty of the people to the Crown was very weak. There were times when George III [1] and George IV [2] and William IV [3] were hooted and pelted in the streets. Even Queen Victoria [4] was for many years unpopular. Her popularity began to increase about the time when the cheap Press transformed itself

[1] In June 1774. Cf. Farrer, op. cit., p. 38.
[2] In Jan. 1817. Cf. *Dictionary of National Biography*, VII, 1081.
[3] Farrer, op. cit., p. 136—citing the *Greville Memoirs*, II, 120.
[4] Cf. Lee, *Queen Victoria* (1902), p. 53.

from a serious attempt to recount the news of the day to a popular gossip-sheet; and, in more recent years, the rise of a Press which contains less print than photographs has contributed further to the popularization of the monarchy. A large amount of deferent loyalty is consciously encouraged. It is encouraged partly as a commercial asset, for the newspapers are able to fill columns with reading material and photographs of the Royal Family. Some parties in the State ally the flag with the Royal Family as constituent elements of their social policy, and as their conception of a proper social structure.[1] Large bodies of local councillors and their dependents, and those who aspire to become local councillors, are eager to receive a representative of the Royal Family to open hospitals, baths, sewage farms, and other works of importance, and if one has ever seen the state of excitement into which a royal visit throws a whole neighbourhood, and witnessed the almost apoplectic capers of a local mayor receiving the personage, one attains to some realization of the strength of an institution which can achieve such bloodless conquests. The Royal Family is never out of the public eye; it never dies; before the heir-apparent is born his parents are in an established and conspicuous position. The Press relates their every action, numerous books are written about the King and Queen and even the youngest of the family. They are surrounded by a social circle which considers direct contact with the Royal Family the mark of the highest social prestige in all civilization, and that social circle is with its manners, its pleasures, its dress, its mansions, and its expenditure, the subject of applauding and envious regard by the mass of average people who live workaday, humdrum lives. The Royal Family always appears immaculate. Its marriages are at once love-matches and services to the State.[2] The Press demonstrates its profound interest in everything, and its superlative abilities ranging from sport to metaphysics. Modern photography has acted like oxygen to the institution of monarchy. Who has not been flattered by a portrait?

The Creation of a Symbol. At every theatre the National Anthem concludes the performance, and hymns not the people's but the King's victory, glory and health. The princes visit, not one University, but two or three. Children's textbooks of history at school are written in terms of reigns, and it may be truly said that the typical prince of the school textbook is the Prince Charming of the fairy stories consider the Black Prince, the Princes in the Tower, the Prince and the White Ship, Bonnie Prince Charlie, and the rest. In short, the sedulous activities of the Press create an ideal king, an ideal queen, and an ideal royal family. They strive for, and attain, perfection. All ills and weaknesses are presented in the guise of

[1] Cf. *Salisbury*, III, Chap. VI.

[2] Cf. Woodward, *Queen Mary*; Trowbridge, *Queen Alexandra, a Study of Royalty.*

human, forgiveable defects, which, indeed, cannot be termed defects at all because they are, after all, all too human; while all the virtues for which the average man and woman strive are said to be there in a superhuman degree.[1] In other words, a symbol is created, free from the dross of human imperfection, and replete with every human excellence. Lord Eldon once said, 'If an infant sovereign were to be on the throne whose head could not be seen over the wig of the Lord Chancellor or the woolsack, he would be supposed to have as much sense, knowledge and experience as if he had reached the years of threescore and ten.'[2] The constitutional doctrine has been created that the King can do no wrong, and this, understood in its social context, is a true conception of the monarchy. A lifelong process of advertisement and clever Press campaigns produces the illusion of an entity to whom it is a crime not to be loyal. This means that so much power is given to the Crown that it is impossible for the word of the King not to weigh with Ministers.

Now the power of the monarch depends not only upon the allegiance of the people but also upon the personality of the King and the personality of his Ministers. The personality of the monarch has naturally varied from time to time. It is, normally, very likely that those who are acknowledged to be in the possession of power will attempt to use it, but it clearly depends upon the character how far the attempt will be carried. Queen Victoria was very tenacious and pugnaciously challenging in regard to every one of her prerogatives. Perusal of her letters and the biographies of her statesmen shows in stark and abundant detail that she did not merely encourage and warn, but very aggressively insisted, reprimanded, conjured, expostulated, triumphed with 'I told you so's!' forced explanations, imposed reconsideration in the Cabinet, even nagged, and on one occasion so enraged Disraeli that he told her that she had the power to dismiss him if she desired to! Edward VII cared little for the minor aspects of business, but he cared very much, as we have said

[1] Cf. *Sunday Times*, 25 April 1930:

'THE KING AT THE THEATRE

'When a man goes to the play three times in one week there can be no question of his being an invalid. . . . On Monday the KING and QUEEN attended a command performance of "Hamlet"; on Wednesday they were at Covent Garden; on Thursday they were present at the Palladium for the command variety performance. SHAKESPEARE, opera and the music-hall, all in one week! A tribute, that, to the catholicity of the Royal taste, and to Their Majesties' love of the theatre.

'The public are glad to have the KING among them again sharing in such amusements and relaxations. A king at the opera—yes: that is in the grand tradition. But a king at a music-hall, enjoying the humour of the people; that, too, is now becoming a tradition thanks to HIS MAJESTY'S constancy, but it has a significance besides. It is an example of the way in which the Royal Family is always eager to identify itself with the enjoyments of the crowd and to prove itself not only royal but human.'

[2] House of Lords, 1830. Cited by MacDonagh, *The English King* (1929), p. 33.

before, about the issues of foreign policy, and it is easily conceivable that a King or Queen of really strong character and emphatic convictions about the nature of social or foreign policy would seek to enforce their views upon the Ministers. The really interesting combination, scientifically, would be a Communist King and a Conservative Ministry.

A great deal depends, of course, almost everything, upon the third factor, namely, the personality of Ministers. They cannot live if they accept a policy indefensible before the country and Parliament. There are, therefore, limits, which may not be very clear, to the extent to which they admit the councils of the Crown. Palmerston was firm against compromise; and he was for the greater part of his time fighting the cause of Liberalism abroad, and would, of course, brook no variety of despotism at Windsor. Sir Robert Peel was suaver in demeanour, but gave way on nothing save points of ceremony. Disraeli was a monarchist only in so far as the rights of the people were not endangered, and he was able, by flattery mixed with firmness, to preserve the Constitution from any substantial shocks from the royal influence [1] Gladstone, of course, usually adamant, sometimes surrendered.[2] On the whole it has been the policy of Conservative Ministers to be more conciliatory to the views of the Crown than Liberals. During the Campbell-Bannerman Ministry King Edward and some of the Ministers were seriously hostile to each other. It is clear that these relationships were bound to affect the extent to which Ministers were ready to give way.

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If we review the general position of the Crown in the political system there are four aspects which seem to be of outstanding importance, apart from the variable though small influence which it may have on policy. Most consistently the Crown has, in the first place, professed to represent the nation as a unity against the factional strife of parties. This has occurred on a number of occasions, and conspicuous examples are the contest over the Reform Bill of 1867,[3] the controversy over the Irish Church in 1869,[4] the conflict over the

[1] *Disraeli*, Vol. VI, Chap. XII. [2] *Gladstone*, Bk. VI, Chap. X, II.

[3] Cf. *Disraeli*, Vol. IV, Chap. XIV, pp. 220, 221: Commenting on the Ministers' decision to proceed by resolution and 'associate the House of Commons, as a whole, with the Government in the shaping of Reform—Queen Victoria wrote on 12 January: "It is the course dictated by common-sense, and which all who are sincerely desirous of seeing the question settled, and who do not use it as a mere weapon of party warfare, are bound to support." Her Majesty offered once more to use her good offices with the Opposition, if desired by the Government. . . .'

[4] Cf. ibid., Vol. V, Chap. III, p. 447: 'That an arrangement, by which the Church obtained a considerable slice of what her friends thought to be her right, was finally arrived at was due mainly to the tireless efforts of the Queen and the Archbishop, maintained in spite of Gladstone's unconciliatory attitude, and to the willingness of Cairns to assume at the last moment, without possibility of due consultation, an onerous responsibility.'

Lloyd George Budget and the Reform of the House of Lords in 1910,[1] and again, in 1914, when the Curragh Rebellion threatened the Home Rule Act.[2] In these instances, and in many others,[3] the Crown has assumed the position that, while Ministers speak in the name of the nation, they cannot avoid a bias which obscures the objective merits of their opponents' attitude, and which is unduly sharpened by their personal and party pride, and by considerations of electoral success, while the Opposition persists in defence of a contrary policy for the same reasons.[4] The Crown, on the other hand, sets itself up as a moderator on the grounds that it is exempt from party feeling and can judge a problem without bias by the standard of continuous national unity and welfare. It argues that it is independent of ties which Ministers and Opposition accept though they themselves, perhaps, feel them to be an improper embarrassment. Whether kings have been free from party bias or not, in a narrow sense, is a question which we need not discuss. As a matter of fact, on the whole, the Crown has always been a strong Conservative factor: that is discernible from the history of every reign. But this does not imply that the Crown has given pledges to a party or that it is always bound to assume an attitude which would commend itself to the party or to its followers, for conservatism is a social and not an electoral product. Whatever its bias, it is clear that it is freer than Ministers to take an independent line. Prince Albert asked:

'Why are princes alone to be denied the credit of having political opinions based upon an anxiety for the national interests, their country's honour and the welfare of mankind? are they not more independently placed than any other politician in the State? Are their interests not most intimately bound up with those of their country? Is the sovereign not the natural guardian of the honour of his country? Is he not necessarily a politician?'

[1] It is believed that the Constitutional Conference of June, 1910, between Ministers and the Unionist leaders, on the Reform of the House of Lords, was first suggested by the King (cf. *Annual Register*, 1910, p. 130).

[2] On 20 July 1910 *The Times* disclosed that the King had issued invitations for the following day to a conference on the Ulster question, at Buckingham Palace. The conference was to consist of two members each from the Government, the Opposition, the Nationalists and the Ulster Covenanters. Whether the King took the initiative or not, the proposal was made with the consent of the Ministry. Cf. Fitzroy, *Memoirs*, I.

[3] Queen Victoria denounced the lack of patriotism of the parties in the conflict over the Franchise Bill in 1884: '. . . Party will ruin the country.' She even went so far as to wish that 'the moderates of both sides' would 'form a third party which would be a check to both the others and prevent this mischief the violents are making' . . .' Letter of 7 Oct. 1884, to the Duke of Argyll, *Letters* (2nd series), III, 547.

King Edward VII strongly advised Campbell-Bannerman to effect a compromise with the House of Lords on the Education Bill of 1906: 'For the King thinks it would be deplorable, from a constitutional and every point of view, were such a conflict to occur . . .' (Letter of 25 Nov. 1906, cited in *Campbell-Bannerman*, II, 302).

[4] Perhaps this may be properly said of the crisis of August, 1931. Yet the Crown has its own bias also, the unavoidable consequence of its upbringing and permanent social environment.

These words were echoed by Queen Victoria and by her successors. It was said in 1923 (but officially denied) that the pacification of Ireland was brought about by the influence of King George, who, personally, deplored the terrible repression and bloodshed.[1] Thus the Crown is a permanent authority with a right of challenge to the Ministry of the day, and, like every authority with such a right, it may bring men to their senses by suddenly confronting them with a point of view which, coming from avowed opponents, was suspect. The only question is, is such an authority essential in the modern organization of parties and Parliament? It is true that we cannot have too much of good counsel, but a proper question always is whether the price is not too high. It may be that the whole institution of the monarchy has such a social power as to cause people to be unduly satisfied with present conditions. It may act as chloroform to the political conscience, and such a price may, by some, be considered too high for the utility of ministrations of the Crown. We have yet, for example, to see whether the alleged initiative of the Crown in the formation of the National Government of August 1931, was comprehensively beneficial. However well-intentioned, every office has its inherent defects of vision.

Secondly, of late years, with the decline of the influence of the Crown in other respects, a new convention has ascribed to it the quality of being a bond of Empire—its 'golden link'. In proportion as the great Dominions have become more and more self-governing,

[1] Cf. the King's speech at the opening of the first Parliament of Northern Ireland, 22 June 1921 (*Times*, 23 June 1921): '. . . I could not have allowed Myself to give Ireland by deputy alone My earnest prayers and good wishes in the new era which opens with this ceremony, and I have therefore come in person, as the Head of the Empire, to inaugurate this Parliament on Irish soil. . . . I speak from a full heart when I pray that My coming to Ireland to-day may prove to be the first step towards an end of strife amongst her people, whatever their race or creed . . .'; and the King's statement read to the House of Commons by Lloyd George (Prime Minister), 29 July 1921 (*Times*, 30 July 1921): 'His Majesty the King has had his attention directed to certain statements reporting an interview with Lord Northcliffe appearing in the *Daily Mail*, and reproduced in the *Daily Express* and some of the Irish newspapers. The statements contained in the report are a complete fabrication. No such conversation as this has taken place, nor were any such remarks as those alleged made by His Majesty. His Majesty also desires it to be made quite clear, as the contrary is suggested in the interview, that in his speech to the Parliament of Northern Ireland he followed the invariable constitutional practice relating to speeches from the Throne in Parliament.'

It is very difficult to understand the following passage which appears in Johnson's *George Harvey* (1930), p. 356: 'The King is as square as a die, and as steadfast as they make them, and when all is said and done, the people follow the King pretty closely in International matters, so long as he keeps scrupulously within his prerogatives, and this he does with amazing skill. Take, for example, that silly misquotation about his ordering Lloyd George to stop killing his Irish people. Anything of that sort is the last he would dream of saying. What he did say to Lloyd George after he had made his speech at Belfast, was: "Now I have done my part, I have a right to expect that you will do yours and carry this matter through to a successful settlement." Those were his exact words. I happen to know because he told me so himself.'

the British Parliament exercising no influence upon their domestic policy and a decreasing authority in their foreign policy, the formal links between the Mother-Country and the Dominions have become few, fragile and practically invisible. Almost simultaneously has arisen the emphasis upon the Crown as the one great formal symbolic link making for the unity of the whole Empire. It is admitted that there is no reason why the Dominion parliaments should be subservient to the Parliament at Westminster. It has equally been asserted that there is no reason why the issues of peace and war for the Dominions should be settled by the Foreign Office and the War Departments of the Mother-Country. At the same time it has been continually re-emphasized that the one strong and abiding link, which symbolizes and reinforces community among the scattered portions of the Empire, is the Crown. How strong this is we shall only be able to tell when the Empire is faced with a crisis which does not involve, as in the last war, the possible annihilation of Great Britain and serious jeopardy to the commercial and political independence of the Dominions, but which involves only a cleft between the Mother-Country and the Dominions. Though this view of the Crown may seem to some to savour of cant, and appear to be a figment of the Press and associations for Imperial propaganda, the Crown is an element of cohesion, something which defines the Empire as an entity distinct from other political entities, and which reduces, as between them, the possibilities of violent separatism. It has also been observed that if it were necessary to the maintenance of the Empire that there should be an elected President, it would be beyond the wit of man to devise a method of election which would be satisfactory to Dominions and Mother-Country. What every one says is likely to be thought true, and what is thought true becomes in time a political force. In England responsible and clever thinkers as well as the Press and large numbers of the public consider the Crown as the 'golden link of Empire' and this may be thought long enough for it to become a firmly-rooted conception before some intra-Imperial dispute dispels the idea. As regards the Dominions, with certain small exceptions, they are more enthusiastic about the Royal Family than England itself and upon the visit of a royal personage their unfeigned joy knows hardly a limit.

Thirdly, the Crown is by ancient prerogative the official chief of the great Services—the Army, the Navy, and the Civil Service, and by statute, of the Air Force. Oaths of allegiance, where they are taken,[1]

[1] The oath of allegiance (or the solemn affirmation permitted by the Oaths Act, 1888) is taken by members of Parliament (Parliamentary Oaths Act, 1866), Privy Councillors, certain Judges, Justices of the Peace (Promissory Oaths Act, 1868), by the clergy (Clerical Subscription Act, 1865) and by aliens desiring naturalization as British subjects (Naturalization Act, 1870). The form of the oath is prescribed in the Act of 1868.

are taken to the Crown and its heirs, and the effect is to evoke loyalty to an unchangeable and never-ending symbol of the State, whose perfection is guaranteed by the process we have described. Further, there is a stability in such a service-relationship which might not be maintainable in a country where loyalty is required merely to a ministry of men daily attacked by hostile Press, their shortcomings ever revealed and ridiculed. In a monarchy the true sources of policy are obscured, and the great impersonal entities, the Crown and the State, are the recipients of a loyalty which might never be given to fallible party leaders. Yet to many there is something finer and more inspiring in serving simply the Republic of France, or the German Reich, or the United States of America.

Lastly, the Crown has come to be the chief of the social edifice, as it is, by inherent character, the fountain of honours. In this respect it exercises a very great influence, especially in a snobbish nation. The Crown, simply being the Crown, cannot exercise any influence unless it is held in high regard. It is held in such high regard, in the long run, partly because the process of advertising induces people to believe in its importance, and partly because it plays upon the feelings of snobbishness. Now snobbishness is merely deference to a higher social group by reason of its prestige, rather than by reason of its inherent spiritual worth, and we cannot deny that such deference still prevails in England, even if less than when Bagehot wrote.[1] This all redounds to the advantage of the monarchy, for whatever it decrees is obviously the condition of the highest social prestige, and, consequently, from the Royal Family outward to the aristocracy, then to the circle just beyond them, and so further down, sifting through the county families, the local government councillors and others, the influence permeates, and makes every action of the Crown admired and imitated. On the whole, that influence is now exerted in favour of the rather conservative decencies and respectabilities of family life. It also, nowadays, exerts itself on behalf of philanthropic institutions, whether promoted by the State or by private charity. It is enough, for example, if the Queen draws attention to maternal mortality for that to become an almost important topic at fashionable week-end parties. The Crown becomes the advertiser, and the effective advertiser, of causes of faith, hope and charity. Some may ask whether there are not attendant disadvantages in a system of this kind whether the institution of monarchy does not engender ambitions, jealousies, snobbery, flattery, from which democracy would well be free. Those who ask that question must ask another—whether in any case it is possible entirely

[1] *English Constitution*, Chap. II: 'We smile at the *Court Circular*; but remember how many people read the *Court Circular*!'

to purge human nature of such sentiments and dispositions, and whether things are really better in countries with an elective chief of state. My opinion is that on the whole the countries with elective chiefs of state have definitely less of these characteristics, and be it remarked, they are not produced by the monarch and the royal family, but by those whose only hope of social prestige lies in courting and exhibiting the royal favour—in short, in exploiting the monarchy for their own advantage.

An Hereditary Monarchy. There are elements in the Chief of State in England which give it a very great command over the mind of average men and women, that is, over the real sovereigns of the country, and often over the minds of Ministers. The monarchy is hereditary.[1] Where the chief of state is elected, he can rarely be stronger than the body which elects him. There is no secret about his character. He cannot arrive at candidature for the office without having spent some years, it may be many years, in an industrial or political occupation. Every one is entitled to inquire into his origin, his achievements, his deficiencies; election is rarely unanimous, and, more frequently, almost as many voters are against him as for him, and in the normal course of events it will happen that there is as much money, propaganda and space in the Press ready to advertise why he is unfit to be President as why he is the fittest of all. Hence the position of a chief of state in other countries is a disputed position, and continually disputable. In fact, the method of election invites to dispute, for if you have failed on one occasion the way to success on the next is to prove that the existing President is not as competent as your own candidate. In the hereditary system there is no dispute except regarding the very institution itself. Once the virtues of heredity are admitted, or to put it in a weaker form, once people are not prepared to dispute the virtues of heredity, the case is finished. The monarch is accepted as a natural fact. There is no legitimate claimant against him; to his position there is no legitimate challenge. If the monarch is challenged, one is liable to the criticism that not a person is being challenged but the State itself. Therefore the hereditary monarch is in a position very much stronger in every respect than the elected chief of state. Further, there are certain incidents of heredity in the English monarchy which increase its awe-inspiring powers: the coronation with its robes and trappings, its anointment, its oaths and professions of loyalty and the solemn ministrations of archbishops and bishops.[2] The Crown is bound up with the official religious structure of the country. In every church, at every service there are prayers for the monarch and his family. The monarch is

[1] Bill of Rights, 1689. Cf. Anson, op. cit., Vol. II, Pt. I, p. 232.

[2] Cf. MacDonagh, *The English King*, Chap. II; W. Jones, *Crowns and Coronations* (1898).

the defender of the official faith of the country and is the chief communicant of the Church of England.[1] In olden days this same line of kings had ascribed to it the power to cure people of terrible diseases by a mere touch, and this goes back, of course, to the connexion of kingly functions with the functions of priest and medicine man, the nature of which have been revealed to us by modern anthropology. The king in early political systems was a wonder-worker. He could produce rain from the skies when it was wanted, and yet prevent floods; make the grain to grow, cattle produce healthy offspring; provide charms for the love-sick; and find an incantation which would most certainly bring victory in war. He was the oracle whose words always came true, because he always had the ultimate right of their interpretation. Do not beliefs of supernatural qualities still lurk in the popular mind? Do not multitudes of common men and women still think that the army is the King's, that the navy is the King's, that the King can, 'if he only wanted to', pardon men for their crimes, and have they not, perhaps, a vague but a very real sense of residual powers which would become effective in full if the King only cared to exert them? I am sure that of large bodies of the population this is true; and that others think it desirable.

Altogether, I think we may say that the personal power of the Crown nowadays is very small. An emergency might make it great. Instead of being, as it was 150 years ago, still a political power of the first magnitude, it has gradually been transformed into a formal instrument of ratification, a symbol of national unity, an instrument for occasionally warning Ministers against the abuse of party spirit, a link of Empire and, for the backward races at home and abroad, an awe-inspiring object of homage and allegiance, and a social factor of great importance. We shall see, in considering the Presidencies of France and Germany, that whatever the intentions of their creators the political centre of gravity lies so much in the Electorate and the Cabinet, that they tend to have no greater power or higher status than the English monarchy.

THE FRENCH PRESIDENT

France has a parliamentary executive, yet the Constitution of 1875 also created a Presidency. He is the supreme symbol of public authority and dignity and has an amount of real power analogous in quality and scope to that of the English monarch. The Constitutional Laws of 1875 do not say, expressly, that the President is vested with the executive power, but after providing for the election of a President they provide him with a number of powers, some of

[1] The title of Defender of the Faith was conferred on Henry VIII by Pope Leo X; later, it was cancelled by Pope Paul III after Henry's repudiation of the Pope's authority in England. It was retained and embodied in the Act of 1543. Cf. also Anson, Vol. II, Pt. II, p. 218.

which are executive in a strict sense, but others of which are legislative in character. Since the Revolution of 1789 the French have been faced with two problems: first, whether their executive should be made responsible to the legislature or to the people directly, and secondly, whether the executive should consist of one or several? The answers, not found without considerable upheaval, are that the President shall be chosen by the legislature and not by the people, and when so chosen, he shall not be responsible politically, and, secondly, that there shall be an irremovable single chief of state co-operating with a removable and responsible body of Ministers. The President of the French Republic holds office for seven years and is re-eligible. So far, however, only one president has consented to be re-elected.[1] Five have resigned,[2] five have served a full term,[3] two have died in office.[4] The one president who consented to be re-elected—Grévy—held office for only two years of his second term. Others have frankly said that they did not wish a further spell of office.[5] The rose of presidential office is, in fact, not all sweetness.

Origin of the Presidency. We have seen, in many other instances, how mankind, even at the most solemn moments of constitutional creation, tends rather to drift into a new political system than fully to master the situation for which they rationally establish the appropriate political forms. Similarly with regard to the French Presidency. The National Assembly of 1870–5 rather drifted into the Presidency than created it with a full consciousness of the nature of their act. Louis Napoleon had been dethroned, and a Republic had been declared in September, 1870. A monarchical National Assembly had been elected, yet the monarchists were not unanimous on the candidate for the monarchy. Thiers had been made by the Assembly, Chief of the Executive Power of the French Republic in February, 1871,[6] and no term of years was laid down in the law creating this office; no conditions of its occupation were established, nor was a definite field of power assigned thereto. Nor did the law specify the status and powers of the Ministers who served under him. Of course, many things in the situation could be taken for granted on

[1] Jules Grévy was re-elected in 1886.

[2] MacMahon (24 May 1873–30 Jan. 1879); Grévy (30 Jan. 1879–2 Dec. 1887); Casimir-Périer (27 June 1894–15 Jan. 1895); Paul Deschanel (18 Feb. 1920–21 Sept. 1920); Millerand (23 Sept. 1920–11 June 1924).

[3] Grévy (first term, 30 Jan. 1879–86); Loubet (18 Feb. 1899–18 Feb. 1906); Fallières (18 Feb. 1906–18 Feb 1913); Poincaré (18 Feb. 1913–18 Feb 1920); Doumergue (13 June 1924–31).

[4] Sadi-Carnot (3 Dec. 1887–25 June 1894—assassinated); Félix Faure (17 Jan. 1895–16 Feb. 1899).

[5] Loubet, Fallières and Poincaré.

[6] Cf. Esmein, *Éléments de Droit Constitutionnel* (8th ed., 1928), II, 8; Hanotaux, *Contemporary France* (trans. by Tarver, 4 vols., 1903), I, 60, 66; *Memoirs of M. Thiers*, 1870–1873 (trans. by Atkinson, 1915), p. 117 ff.

the basis of previous political practice, and from the general sense of the Assembly. For example, it could be expected that Ministers should retain their office until they were revoked by the Assembly; and similarly with the Chief of the Executive Power, for he had been made, and presumably could be unmade, by the Assembly. From August, 1871, there commenced a further slide into the 'Presidency' of the Republic. In that month a proposition of law was made by Rivet that there should be a President of the Republic, that the President of the Republic should hold office for three years, being irremovable during that time. This proposition was vitally amended by the Assembly and came out in the following form: that (1) there should be a President of the Republic, (2) that he should hold office until the Assembly had finished its work, (3) that he was to be responsible to the Assembly, and (4) that his council of Ministers were to be 'responsible', countersigning all the political actions of the President. This was a curious system. The Assembly had refused to provide a term of three years for the President out of fear that their power to remove an unsatisfactory President would be thereby destroyed. But now they gave the President a term of office as long as, but not exceeding, their own, and then went on to make him 'responsible' to the Assembly which, if it meant anything, meant that at any time the Assembly could overthrow the President. Further, a system of dual responsibility was created, in that, not only was the President responsible but his council of Ministers also. Out of this system a great deal of friction arose, as might have been expected, for in regard to current political activities, the question was always raised, who was responsible, President or Ministers? Several months' operation of this system showed the impossibility of its continuance. A report by the Duc de Broglie on the system says:

'The deficiency was revealed by a sad fact, namely, the frequent recurrence of conflicts between the sovereign Assembly and the eminent chief to whom it had confided executive power. For two years these conflicts have continually occurred, either on the question of important clauses of our great organic laws or on incidents of general politics, and when they arise the Assembly finds itself placed in the cruellest dilemma. The president of the republic represents unhappy France in the eyes of Europe too well for us to be able to hear him, without alarm, speak of abandoning the task which we have confided to him. But the Assembly has its mandate as well, which it holds from France, and which it cannot desert.'[1]

In short, the Assembly found itself faced with the necessity of deciding more clearly the kind of Presidency which could operate smoothly over a long period. But they were faced with the difficulty of creating a new system satisfactory at once to Republicans and

[1] Rapport du duc de Broglie à l'Assemblée du 21 février 1873 (*J. Off.* du 22 février, p. 1285 et suiv.), No. 1. Cited in Esmein, op. cit., II, 12.

Monarchists. The Republican element in the Assembly could not envisage a President who was not responsible to the Assembly, because an irresponsible executive was not Republican. On the other hand, the Monarchists desired both strength and irresponsibility in the Presidency. To emerge from this difficulty it was decided, in 1873, to divide the objects of government for which the President and his Ministers as a body were responsible and, as regards the President, reduce his opportunities of personal appearance before the Assembly since the oratorical power and personal force of Thiers were feared. In exchange for this deprivation the President was to be given a right of veto. Thiers, however, refused to work in such a system, saying that it struck at the very vitals of his power, namely, his opportunity of acting directly upon the Assembly. In place of Thiers, General MacMahon was elected, since the situation was more acceptable to a soldier than an orator. While he was in office the Assembly made efforts to create a definite Constitution and, having discovered that it was impossible to find one single royal candidate for a monarchy who would be supported by the rival monarchical groups in the Assembly, the moderate monarchists began to urge the creation of a regular Presidency. They suggested that MacMahon personally should be given the Presidency for ten years. Others, more Republican, made the counter-proposition of five years, and a compromise was reached on seven years. This arrangement determined the length of office of the President. It is clear that there was no rational consideration of the significance of this term of office: it was simply a compromise between the ideas of monarchical permanence and republican rotation. In 1875, almost by accident, and certainly by a very small majority—in fact, by a majority of one out of 705 voting the article was voted that 'the President of the Republic is elected by an absolute majority of the votes of the Senate and the Chamber of Deputies met in National Assembly. He is appointed for seven years. He is re-eligible'.[1] This provided for a succession of Presidents. Thus, the term of office for seven years, and a Presidency elected by the National Assembly, were the result of the mutual concessions of monarchists and republicans. The system created was not only the result of a necessary compromise, but also represented the effect of the general permeation of the world with English ideas of government, for, as we shall see, the powers of the President were made curiously similar to those exercised by the English constitutional monarch. In fact, it has been said that the French President is 'a constitutional monarch for seven years'.

Election. The President is elected by a National Assembly, that is, by the Chamber of Deputies and the Senate in joint session at

[1] *Law of 25 Feb., Art. 2.*

Versailles.[1] If there are several candidates there are successive ballotings until one candidate obtains an absolute majority. This system of election vitally differentiates the Presidency from the English Crown, which is hereditary and normally for the lifetime of each successor. It is different, also, from America, since in that country the election of the President is now virtually, as we have shown, by direct suffrage. It differs, too, from the arrangements of the new German Constitution, where the President is chosen by direct election. What are the reasons for the system of indirect election adopted in France? One is the rapidity and quietness of the method; and to this may be added the strong sense of self-importance of French parliamentarians. The other reason is, that, owing to unfortunate experience, the French are very shy of plebiscites.[2] When the National Assembly meets in France there are subterranean soundings of the various candidates, and for some time before the outgoing President's term comes to an end, likely candidates are already looked for and discussed. What the Chamber of Deputies and the Senate seek is, generally, a candidate who will not attempt to act independently of responsible Ministers, who will not assume an independent and critical attitude towards the Chambers. Further, the groups which happen to be dominant attempt to secure at one and the same time a President who will not embarrass a Cabinet of their own party or parties, but who may act as a permanent representative of their general political views in the Presidency. This seems to be borne out by all the elections so far, and the facts which were revealed during and after the election of Poincaré in 1913, and Millerand in 1920, point emphatically to the truth of this generalization. A noted French administrator describes with genial cynicism the culmination of a Presidential election:

'After some flattering words to the journalists, the only people, apart from assassins, whom he has henceforth to fear, the newly-elected President leaves the royal palace and, to the rolling of drums, enters a carriage drawn by artillery horses and drives off to the Élysée. Everything has proceeded with the greatest smoothness. . . . The carriage goes at a great pace towards the Champs Élysées and turns up the Avenue Marigny. The loungers raise their hats and think "There he is for seven years at the rate of 1,200,000 a year."'[3]

The electoral conditions suggest the character of the French Presidency: it is remote from the people and therefore it is neither

[1] Cf. Pierre, *Traité de Droit Politique, Électoral et Parlementaire* para. 329 ff.; Esmein, op. cit., II, 40; Duguit, *Traité de Droit Constitutionnel*, II, 657; and IV, 558.

[2] The plebiscite had, in 1848, produced Napoleon III, who became Emperor on the basis of an overwhelming majority acquired by all steps to 'ensure the free and sincere expression of the will of the nation'! In the memorandum upon the Constitution proposed by Dufaure in 1873, popular election of the President is mentioned with this remark only: 'This method, already experienced, has not left us memories which recommend it.'

[3] Chardon, *L'Administration de la France* (1908), p. 80.

as strong nor independent as the American or the German. It lacks the strength given by hereditary principle, and it is chosen by Parliament, which, necessarily, does not go out of its way to choose a man strong enough to be its rival.

It has occurred that the President has been, to the time of his election, already in office as President of the Chamber of Deputies or as Prime Minister.[1] It is the practice for such people, then, to resign their office in order to avoid criticism in the course of their ordinary functions. This clearly is a wise convention.

The Nature and Powers of the Presidency. Though the title is impressive, the President's real position is not of great authority. Indeed, derision is not seldom the attitude to the office: the President is said to be 'an inert corpse', or it is asserted that he occupies his time hunting rabbits on his official estate of Rambouillet.[2] As regards power, he is, in fact, in a position analogous to that of the King of England. He is chief of a parliamentary State and not chief of the Government. He reigns, but hardly rules; and when the monarchists assented to his creation they won a title but lost an institution. We have already seen that with the Senate and the President's power to dissolve the Chamber of Deputies they hoped to create an institution which might be a stopgap for a future monarchy. The clear-sighted members of the National Assembly, however, saw that within a system where Ministers were responsible to the Chambers, the President could not but become a formal part of the political machine. The laws seem to make the President very powerful, and we shall enumerate the powers from the Constitution, but it must be remembered, throughout, that these powers are exercised within a parliamentary system.

The President has the right to initiate laws.[3] He promulgates laws when they have been voted by the Chambers [4]; he superintends and ensures their execution [5]; he has the right of pardon [6]; he disposes of the armed forces [7]: he appoints to all civil and military office [8]; he presides at national ceremonies [9]; he accredits ambassadors of foreign powers [10]; he appoints one section of the Councillors of State [11];

[1] E.g. Casimir-Périer, Loubet, Fallières, Poincaré and Doumergue were Prime Minister before they became President of the Republic. Casimir-Périer had also previously been President of the Chamber of Deputies, a position held by Deschanel as well; Doumer (1931) was President of the Senate.

[2] Cf. Leyret, *Le Président de la République* (1913), p. 12, citing J. J. Weiss.

[3] Law of 25 Feb. 1875, Art. 3, Sect. 1; Pierre, op. cit., paras. 59, 61, 62.

[4] Law of 16 July 1875, Art. 7, and 25 Feb. 1875, Art. 3, Sect. 1; Pierre, para. 506.

[5] Law of 25 Feb. 1875, Art. 3, Sect. 1; cf. Esmein, II, 79 ff.; Jèze, *Droit Administratif* (3rd ed., 1925), I, 378.

[6] Law of 25 Feb. 1875, Art. 3, Sect. 2; Pierre, para. 564; Esmein, II, 148.

[7] Ibid., Sect. 3; Pierre, para. 92.

[8] Ibid., Sect. 4; Pierre, loc. cit.; Flauriou, *Précis de Droit Constitutionnel* (2nd ed., 1929), p. 426 ff.

[9] Ibid., Sect. 5; Pierre, loc. cit.

[10] Ibid., Sect. 5; Pierre, loc. cit.; Esmein, II, 190.

[11] Ibid., Art. 4.

he may, with the advice and consent of the Senate, dissolve the Chamber of Deputies before the expiration of its term [1]; he may indicate to the Chambers the necessity for revision of the Constitution [2]; he may convoke the Chambers in special session [3]; he closes their sessions and adjourns them [4]; he may communicate with the Chambers by messages which are read by a Minister [5]; he promulgates within a fixed period [6] (within which, however, he may require a reconsideration of the Bill by the two Chambers). The President negotiates and ratifies treaties and informs the Chambers of their progress as soon as the interest and security of the State permits it [7]; but treaties of peace, and commerce, treaties which engage the finances of the State, those which are relative to the condition of persons and to the right of property of French citizens living abroad, require for their validity ratification by the Chambers.[8] No cession, exchange or extension of territory can take place excepting by virtue of a law.[9] The President cannot declare war without the previous consent of the two Chambers.

All these powers are formidable for those who possess the right of freely deciding their exercise. But that right does not belong to the President, for Article 3 of the Constitutional Law of the 25th February 1875, says, after having ascribed to the President a number of important powers: 'each of the acts of the President of the Republic must be countersigned by a Minister', and Article 6 says: 'Ministers are collectively responsible before the Chambers for the general policy of the Government and individually for their personal acts and the President of the Republic is not responsible except in the case of high treason'.[10]

We have seen in previous chapters that the fundamental principle of politics in the modern State is that only the responsible institution shall exercise power. The President here is divested of any responsibility except in the case of treason, that is to say, in the case of a highly abnormal exercise of power; but the normal work of government is fully placed upon the shoulders of the Ministers who are responsible to the Chambers and the country. Moreover, the act of counter-signature has become in the modern State the recognized

[1] Law of 25 Feb. 1875, Art. 5, Sect. I, and cf. *supra*.
[2] Ibid., Art. 8; Pierre, para. 4.
[3] Law of 16 July 1875, Art. 2; Pierre, para. 499.
[4] Ibid., Art. 2; Pierre, para. 502.
[5] Ibid., Art. 6; Pierre, para. 634.
[6] Ibid., Art. 7; Pierre, para. 506; Esmein, II. 73; Flaurion, op. cit., p. 437.
[7] Ibid., Art. 8; Esmein, II, 198.
[8] Ibid., Art. 8. Cf. Barthélemy, *Démocratie et Politique Étrangère* (1917); Chow, *Le Contrôle Parlementaire de la Politique Étrangère en France et aux États-Unis* (Thesis, Paris, 1920).
[9] Ibid., Art. 8.
[10] Ibid., Art. 9; Esmein, II, 211; Duguit, IV, 802–6.

method of accepting at once responsibility and power. It may be taken as a general rule, that excepting for the signature of documents directly instrumental to these various duties, the President is nothing but an ornament in the French political system. Even his signature has been declared to have nothing other than autograph value, excepting in the case of his resignation. But we will not stress this weakness of the President to the point of saying that he has no power at all. No person with character, with personality, with intellect, with intelligence, and with political experience, can be entirely powerless. For even a frown and a shrug of the shoulders have their effect upon other human beings. Let us begin, however, with the weakness of the President and explain it.

The Weakness of the Presidency. The President is the creature of Parliament. He has in every case been a member of one or other of the assemblies for years.[1] He cannot have avoided absorbing the general theory of the Presidency held in Parliament itself, and that theory is that the Chambers are sovereign; that the Cabinet is the offspring of that sovereignty, to be strictly controlled by the Chambers, and that the President is certainly no more than this—on the contrary, much less. The Assembly can only be master of policy if it entrusts policy to a body which is itself removable, and which is therefore obliged day by day to seek the means of conciliating its creators. The President, however, is by the Constitution in office for seven years, and he *need* not give an account to anybody. He is not obliged to explain or to conciliate, and if he is a strong man, that is to say, if he can stand the scurrilous attacks of Parliament and Press,—and it must be admitted that in France these attacks are sufficiently vitriolic—he may snap his fingers at the Chambers and continue his own way. It cannot be expected, therefore, that bodies so strongly conscious and desirous of their own supremacy should place in power a man of invincible strength, and if they did, to vest power in such a person rather than the Ministry responsible to them. The Chambers of France have a permanent Cæsar complex.[2]

The Fate of Strong Presidents. Clemenceau has said: 'I vote for the most stupid.' Nevertheless, it must be admitted that from time to time when the country is stirred, as in 1913 by the Balkan

[1] E.g. Sadi-Carnot first elected to the National Assembly, 1871; Casimir-Périer first elected to the Chamber of Deputies, 1876; Faure 1881; Loubet 1876; Fallières 1876; *Poincaré* 1887; *Deschanel* 1885; *Millerand* 1885; *Doumergue* 1893.

[2] It was to be expected that the Chamber of Deputies of 1920 should have refused to consider Clemenceau for the Presidency. 'A Parliament is always irritated with a man whose politics are national in scope. . . . I don't know why, but they were always in a terrible funk because I dragged them into places where they had no desire to go. . . . I shouldn't have remained in office three months. I shouldn't have waited a week before going off the deep end. If I had agreed to take over that job it wouldn't have been for the purpose of opening Horticultural Exhibitions, etc.' Cf. Martet, *Clemenceau* (1930).

War, and that clouding of the horizon which ultimately led to the Great War, or, as in 1920, when France still felt herself to be in a state of war, that men are chosen who accord, broadly, with the dominant political views of the time, and are likely to be a permanent favourable influence. Thus it may occur, as in the case of Thiers, as in the case of Poincaré, as in the case of Millerand, that a strong man is chosen as President, as a servant of a policy, rather than of the routine of the Constitution. But the fate of those strong men is itself an exceedingly interesting revelation of the character of the Presidency. Thiers was soon overthrown—overthrown by the passive resistance and guerrilla attacks of the National Assembly. Millerand, after four years of office, was faced with an impasse, was humiliated and obliged to resign, since the Chamber of Deputies threatened to overturn Ministry after Ministry until he did. It was a Chamber of Deputies which had been elected during his term of office, and it refused to be bound by the notions of its predecessor.[1] Poincaré alone served his seven years as a strong President, but in what circumstances? In circumstances ideal for the exercise of power: one year was spent in preparation for war, the next five years in the prosecution of war, when power tends to go into the hands of the Executive and out of the hands of popular assemblies, especially when the enemy is on one's own territory, and the final year was spent in the liquidation of the War.[2] Nor did the Assembly of 1920 appear anxious to continue Poincaré's presidential functions. It turned elsewhere.[3] In 1931 Briand was defeated for the Presidency because his foreign policy displeased the Right and the Centre, and many members of the Left had personal jealousies and grudges against him. He was too potent a man to become a figure-head.

In the main, therefore, the President signs the acts of Ministers and executes not his own will but theirs. As a former French President,

[1] Millerand was elected by a National Assembly much influenced by the war spirit and controlled by the large number of votes which the *Bloc National* had obtained in the elections of 1919 on a policy strongly Conservative, authoritarian and warlike. But in the elections of May, 1924, the parties of the Left had a very great victory and were not prepared to be passive under the representative of the previous Parliament.

[2] As soon as Poincaré became President it was possible to discern a change of view regarding the authority of the President which is in contrast to the remarks made when he was professing to refuse candidature on the grounds of the powerlessness of the President. Cf. President's Message, 20 Feb. 1913: 'The prerogatives of Parliament harmonize without friction with the rights and duties of the Government, and the weakening of the executive power is not in the wishes of Parliament, nor in those of the people. Without a strong and clear-sighted executive power, the good operation of the administrative services would soon risk being compromised, and at certain times, the public peace itself might be menaced. During the whole course of my Magistracy I will see, in accord with the responsible Ministers, that the Government of the Republic conserves intact, under the control of Parliament, the authority which ought to belong to it.'

[3] Cf. *New Europe* (London), at the proper date.

Casimir-Périer, has put it, 'among all the powers which seem to be attributed to him, there is only one that the President of the Republic can exercise freely and personally—it is to preside at National functions'.[1] The power of the President to initiate the laws is a power of the Cabinet. His superintendence and execution of the laws is in no wise in his hands. The privilege of pardon is a political matter exercised on the responsibility and by the discretion of the Cabinet. Appointment to civil and military office is, of course, regulated by laws which effectively deprive him of all save the smallest personal discretion. His functions in regard to the parliamentary assemblies are Cabinet functions. His suspensive veto on legislation has never been exercised, and it has been pointed out that its exercise is legally inadmissible, and practically impossible.[2] In the administration of law, in naval and military administration, in the civil services, there is not even the pretence that the function is one in the name of the President. Justice is the justice of the Republic, officials the servants of the Republic, the armed forces sustain the Republic—not the President.

We have also seen that since 1877 the power of the President to secure a dissolution of the Chamber of Deputies has been virtually eliminated from the Constitution.

The Strength of the President. Yet there are opportunities for the exercise of influence which are not present for the chief of state in the British Constitution. We have shown that in France the party system consists of a number of small groups not permanently cohesive, and with a comparatively uncertain leadership. All Ministries are coalition Ministries. Before a Ministry can be formed, therefore, bargains of principle are negotiated between the various groups, and in these negotiations the President takes the initiative and is consulted all through. The President, therefore, has an important real power of choice; for the size of any one group does not necessarily result in its invitation to form a Ministry. The personal and political predilections of the President are potent in the choice. Not only does this hold good of the Prime Minister but it is, perhaps, more important in the case of the rest of the members of the Cabinet. It is well known, for example, that Clemenceau was kept out of the presidency of the Council of Ministers for years by Poincaré, whom he had offended during the presidential election of 1913.[3] Millerand

[1] Cf. *Lettre de Casimir-Périer* written to the editor of *Le Temps*, 22 Feb. 1905—reproduced in Leyret, op. cit., p. 257.

[2] Cf. Duguit (IV, 659) who considers that the exercise of the suspensive veto is practically impossible rather than legally inadmissible: it is no more illegal than the right of dissolution 'and indeed it is for the same reason that it is never used'. He criticizes Esmein's view that its exercise would be contrary to the principle that a simple majority suffices to pass a law and that an irresponsible President is not constitutionally entitled to the veto (cf. Esmein, II, 73 ff.).

[3] Cf. Jèze, in *Revue du droit public*, Jan.–Mar., 1913, p. 113 ff.; and Poincaré, *Au Service de la France*, III (which also gives interesting comments on the relative power of President and Prime Minister).

also was able for a time, but only for a time, to upset and make Ministries.[1] Now, if the President has a power of promoting to office, he has won for himself a friend in future deliberations between the President and the Cabinet. We have to remember, however, what some presidents have disastrously forgotten—that although a President may set up a Ministry the Chambers may cause its downfall.

Secondly, in French practice there are two kinds of Cabinet meeting: (1) the Council of Ministers and (2) the Council Cabinet. The latter is rather a private arrangement of Ministers to consider the immediate work which will involve parliamentary consequences, and to plan tactics. It is political in the narrow party and parliamentary sense. At these meetings the President is not present. But the Council of Ministers meets frequently to consider matters of general policy, and here the President has maintained his right of attendance and, of course, participation in discussion. It is quite clear that the scope of his authority depends almost entirely upon his personal qualities. The Cabinet may completely ignore his intervention, for the law of the Constitution assigns to him no responsibility. He can only get the power which his personal qualities merit, and can hardly support himself by reference to the law. Consequently, the extent to which presidents have participated effectively in the creation of policy has widely varied.[2]

Apart from personal qualities, there are certain factors common to all presidents, which tend to give them the possibilities of power. The first is that the President stands outside any detailed departmental work, and therefore is the freer to take broad views of national needs, and when we consider, as we have considered in the previous chapter, the enormous burden of administrative detail which bears down the freely speculating spirit of a modern Cabinet Minister, we can see that here the President enjoys a very great advantage. Then, also, whereas the average Ministry lasts months, his power lasts years, and it would not be going too far to say that from the second year of his office onwards, his experience of Cabinet business, of the plans which have been suggested or tried, and their vicissitudes, must be of great value to any Ministry. How far this actually goes it is impossible for us to say. It is enough that French observers themselves admit that a power lies there.

In the English system an element of executive government which seems to have been considered the peculiar province of the King is foreign affairs. Now it happens that, owing to the international

[1] E.g. Millerand recalled Briand from the Conference at Cannes (Jan. 1922), where France, England and Belgium had considered Germany's inability to pay the sum required of her in 1922. The chief decision of the Conference was to hold a general European Conference at Genoa. Briand's resignation from the Prime Ministership was further insured by the hostility of the French Parliament.

[2] Cf. Barthélemy, *Précis de Droit Constitutionnel* (1926), p. 545.

anarchy of the years before the War, and to the need for the balance of power, there was thrown into the hands of the executive authority in all countries the power to negotiate secretly and make binding engagements. In regard to certain treaties, as we have seen, the French Constitution requires ratification by Parliament. Such great political treaties and settlements, however, as the Treaty of Berlin of 1878, the arrangements with England, which have been proved to have been binding enough to form a firm basis of French policy, and the Alliance with Russia, do not come within the scope of the Constitution, and it has been admitted that in regard to the last-mentioned the President had a great deal of responsibility. This may happen because people are often willing to forgo constitutional guarantees in times of urgent or approaching danger. And yet, if we may judge from the Poincaré souvenirs,[1] the two years preceding the War hardly find a mention of President Fallières, excepting that he was used as a kind of minor ambassador and banquet-missionary when the Cabinet thought it necessary to make a specially significant statement to the world at large.

Altogether, then, we have to say that the President's power is dependent upon his person and the contingencies of politics. Poincaré himself, when first approached to become President, refused. Whether the refusal was the usual diplomatic one which is made only in order to increase the ardour of the proposer no one can tell. He refused on the grounds of the powerlessness of the President. He says:

'Profoundly surprised at this suggestion, for which nothing had prepared me, I rejected it very emphatically. Nothing seemed less made for my type of mind than an office of which I did not misunderstand the high moral authority, but which meant for its holder a perpetual renunciation of his own ideas, and which imposed upon him most often a duty of inaction. I objected to Monsieur Bourgeois my relative youth, the no doubt passing, but necessarily numerous, enmities which would unavoidably distract me from the exercise of government, my taste for reading and for freedom. I repeated to him that nothing was farther from my mind than his project, but I insisted on my own, which was, that Bourgeois should become candidate, and that I would not listen to his refusal.'[2]

Casimir-Périer, who resigned because his nature was too strong to bear the necessary restrictions of the office, said: 'The Presidency of the Republic is denied all means of action and of control. I cannot resign myself to support a weight of moral responsibilities that bear on me and the impotence to which I am condemned.[3]

A recent writer had said, in referring to the election of M. Deschanel and the defeat of Clemenceau in the election of 1920, that what is especially desired in the holder of the office to which M. Deschanel

[1] Cf. Poincaré, *Au Service de la France*. [2] Ibid., II. 72.
[3] Casimir-Périer's Letter of Resignation, 15 Jan. 1895, reproduced in Leyret, op. cit., pp. 248–50.

had been elected, 'apart from its mere decorative functions, is a character possessing the qualification of a first-rate permanent head of a civil service department, a first-rate judge and a strong but conciliatory adviser of great weight, knowledge and discernment in all affairs of State'.[1] Jèze, supremely keen of insight into the nature of French politics and administration, says: 'The election to the presidency has been, to the man chosen, the coronation of an honourable but effaced political life, the supreme recompense of his honest mediocrity, a golden retirement.'[2] Whether these qualities are desirable, whether they are effective, depends in the last resort upon political contingencies, but one thing is sure, that especially the man of great qualities is manacled by constitutional law and convention, and this is shown very clearly by the rise and fall of President Millerand.

Millerand had been Prime Minister, and was elected President.[3] He immediately assumed the position that as the President is given the power by the Constitution, whoever actually carries out the work of government, the blame or praise is the President's.[4] He urged, on this assumption, and because the Chamber of Deputies wasted its time and was incompetent and France needed a continuous and consistent policy, that the creation of policy must be the President's, it being his business to find a Ministry to vindicate his policy in the places demanded by the Constitution. In other words, the

[1] *New Europe* (London), 1920, at proper date.

[2] Jèze, *Revue du Droit Public*, 1913.

[3] Millerand was elected President on 23 Sept. 1920, by 695 out of 892 votes cast. Cf. Edouard Juha, *M. Millerand à la Présidence de la République* (*Revue Politique et Parlementaire*, Oct. 1920, pp. 5–14), for some interesting comments: The election 'marks the complete abolition of the fears we have hitherto entertained of individuals, who on account of their dispositions, might give too great a prominence to the Presidency and repress the powers of the people.

'. . . France no longer fears a leader because she is strong enough to rid herself of him immediately—if the person she elected were, through blindness, to abuse his mandate. . . .'

[4] Cf. President Millerand's Message to the Senate and the Chamber of Deputies (25 Sept.) reported in *The Times*, 27 Sept. 1920: 'By calling the Prime Minister to the Supreme Legislature, the National Assembly has shown its will to maintain and pursue abroad, as well as at home, the policy which the two Chambers have not ceased to approve during a period of eight months. I have accepted this post of duty and honour in which you have placed me with the sole aim of serving this policy with more vigour and continuity. France has experienced the lessons of the War and those of her children who died for her will not have given in vain the example of their sublime sacrifice. On their graves a new France has been born. . . .

'The Nation is for ever bound to the Republican *régime* (continued the President), which, after having corrected the errors and faults of personal power, has fulfilled its work in reconstituting the unity of the country. Universal suffrage is the rule; its will, manifested by the voice of its representatives, needs, in order to be accomplished and respected, a free Executive power under the control of Parliament and an independent judicial power.' . . . Then follows a brief reference to 'desirable modifications in the constitutional laws' (i.e. regarding the powers of the President) which must be considered in calm and quiet after 'a more urgent task' has been brought to a successful conclusion. The message continues with an outline of Millerand's policy regarding the Treaty of Versailles, the Army and the Navy.

Ministers were to be the President's tools. He claimed that as Prime Minister he had pursued a certain policy and it had secured the confidence of Parliament.

'I think,' he continued, 'and I have given my reasons for this belief, that nowhere can I do such useful service as I can as premier. If, however, the majority of the Chambers considers my presence at the Élysée preferable for the maintenance and pursuit of its national policy, and if it thinks, like myself, that the President of the Republic, while he should never be a man of one party, can and ought to be a man in close collaboration with the Ministers with a settled and applied policy, I will not remain deaf to the appeal of the nation's representatives.'

On this declaration he was elected President, and immediately proceeded to execute his ideas.[1]

There were four possibilities in such a situation: (1) that the President might sink back into a position of impotence, which was likely; (2) that he might persuade the Chambers to amend the Constitution in his favour, and that was almost impossible; (3) that he might resign office and return to the Chambers after finding that his attempts to play the strong man were thwarted; this was the most likely thing to happen, as it had happened before to Casimir-Périer; or (4) that he might be removed from office in the course of a revolution.

In fact, the third eventuality occurred within three years. The President attempted to rule by Ministers who, at first, had the support of the majority of the Chambers, that majority having naturally almost the same political aims as Millerand. His policy seemed to be his alone. He even recalled, almost by main force, M. Briand, Foreign Minister, from Cannes, during an international conference.[2] Within three years, however, Millerand was obliged to reconsider his views on the presidency in that tone of bluster which is not infrequently used by people unsure of their power. He went to the extreme of suggesting the dissolution of the Chamber at each ministerial crisis. He proposed the introduction into the Constitution of a clause permitting the President to dissolve on his sole initiative should he consider a ministerial crisis unjustified and, going further, along the path which such an extension of power already suggested, he indicated the necessity of strengthening the authority of the President by enlarging the constituent body which selected him.[3] After the elections of 1924

[1] Cf. Recouly, *Une Visite au Président Millerand*, *Revue de France*, 15 Nov. 1923, pp. 225–37: He (Millerand) has the habit of saying: 'If it is my duty not to be a member of any coterie, of any party, I have a perfect right to support a policy.'

[2] Cf. *Revue Politique et Parlementaire*, 1923, p. 289 ff.

[3] Cf. Recouly, op. cit.: The strengthening of the President's and Ministry's power *vis-à-vis* Parliament can be brought about as follows:

1. For the President to have power he must not have a mandate only from the Chambers, as at present. One should and could add to the National Assembly when it meets to elect the Head of the State a certain number of other electors—delegates of the *Conseils Généraux* (locally elected authorities), representatives of

Millerand found it impossible to proceed upon the principle he had laid down, for the Chamber of 1924 was otherwise composed than that of 1920. On principle, Herriot, Leader of the Radical-Socialists, refused to form a Ministry.[1] The Prime Ministership was offered to M. François Marsal, at which stage the President sent a message to the Chambers pointing out that the President was not responsible excepting in the case of high treason, and that this meant that in the national interest of 'continuity', the presidential power was for seven years sheltered from political fluctuations. In other words, he still wished to maintain Cabinets in accord with his own political principles and not necessarily in accord with those of the Chambers. 'You will respect the Constitution', said the President. 'If you misunderstand it, if it is understood that the hazard of a majority may oblige the President of the Republic to retire for political reasons, the President of the Republic would no longer be more than a plaything in the hands of the parties.'[2] This challenge was, of course, immediately met by the Chamber of Deputies, which enjoys nothing more than a pillow-fight for principles, and several interpellations were immediately lodged.[3] The Herriot group refused to enter into any relations with a Ministry named by the President of the Republic, and by a majority of 327 to 217 the Chamber adopted M. Herriot's proposition:

'The Chamber resolves not to enter into relations with a Ministry which by its composition is a negation of the right of Parliament, and refuses the

the big employers' and workers' associations, and of learned and artistic societies. Greater authority would result from this election.

2. Unlimited power of dissolution to be used once when the President considers the Ministry has been overthrown '*sans raison*'.

3. Further—the Senate to have additional representation from professional associations, chambers of commerce, employers' and workers' unions, rural and urban, the Confederation Général du Travail, Universities and Academies.

'I am convinced', he would say, 'that this penetration of the corporative spirit would have a most beneficial effect on the course of public affairs.'

[1] Cf. Herriot, *Pourquoi je suis Radical-Socialist.*

[2] Message read to the Chamber of Deputies, 10 June 1924. Cf. *Débats*, 1924, CXXIII. 63. 64

[3] The following interpellations were immediately lodged (i.e 10 June 1924, *Débats*, vol. cited, p. 64). Of:

1. Marcel Cachin on the general policy of the Government.

2. Léon Blum on the circumstances in which the Government had been formed.

3. Paul Aubriot on the steps which the Government proposes to take in order to carry out the political programme outlined by the President of the Republic at Evreux.

4. *Charles Reibel on the circumstances in which the Cabinet was formed.*

5. Marcel Hérand on the ministerial declaration.

6. Leredu on the circumstances which brought about the formation of the Government.

Of these, the interpellation of M. Reibel (signed by Jean Carnot) was debated: 'The Chamber, being resolved to safeguard Articles 2 and 6 of the Law of 25 Feb. 1875, which constitute one of the fundamental guarantees of the Republic, proceeds to the Order of the Day.' Herriot's proposition (given in text *infra*) was adopted however (the same debate and day).

unconstitutional debate to which it is invited, and decides to adjourn all discussion to the day when a government constituted conformably to the sovereign will of the country shall present itself before it.'[1]

A great deal of discussion arose regarding the constitutionality of this formula. It was also asked whether the President of the Republic had acted constitutionally in calling upon M. François Marsal to be Prime Minister.[2] It was urged that as Herriot had been asked to form a Ministry first and had refused, the President was quite within his constitutional rights in calling upon somebody else. As regards the formula, it was held generally that it was unconstitutional since it was actually directed, not against the Ministry which was before it, but against the President of the Republic.[3] However, these are occasions when whether a thing is constitutional is only a question for aspirant doctors of philosophy. The Senate followed the lead of the Chamber of Deputies. Millerand, crying out that he was resigning because the politicians had refused their collaboration, resigned.[4] This example shows, I think, the true weakness of the presidency. All the

[1] Herriot's motion of adjournment was signed by Raynaldy, Maurice Viollette and Léon Blum. Cf. *Débats*, vol. cited, pp. 64, 76.

[2] Cf. *Débats*, loc. cit., pp. 64–76; Duguit, IV, 555, 556.

[3] Ibid., pp. 557, 558.

[4] Cf. Letter read in Senate, 11 June 1924, by M. Gaston Doumergue. (Read earlier in the day by Millerand to the Cabinet.) Reported in *The Times*, 12 June 1924. The declaration begins:

'My dear Fellow-citizens,—

'At the moment of giving up the powers which the National Assembly conferred upon me by more than three-quarters of its votes, on 23 September 1920, I wish to address myself to you.

'As First Magistrate of the Republic, called upon, on the morrow of the cruellest and most glorious of wars, to watch over the destinies of France, I knew that your unanimous wishes were summed up in one word—peace. . . .

'On May 11th the General Election took place. Faithful to the first duty of the President of the Republic, which is a scrupulous respect for the wishes expressed by universal suffrage, I turned to the politicians indicated by it. I meant to work with them in all loyalty in the carrying on of public affairs. They replied to my offers by a refusal. They demanded my resignation.

'This is an unjustifiable claim, violently opposed both to the spirit and to the letter of the Law of the Constitution. If our Constitution places the choice of the Chief of the State solely in the hands of the Members of Parliament, it has at least been prudent enough to lay down that, once elected, he shall not, except in the case of high treason, have to render an account to any one during his seven year term.

'This guarantee has just been overthrown by a decision inspired by the party spirit of certain agitators. Under their pressure extra-Parliamentary meetings have declared that the President of the Republic, if he is not agreeable to the majority of the new Chamber, must immediately retire, without awaiting the legal termination of his mandate. This is a terrible precedent, which makes the Presidency of the Republic depend upon electoral struggles, which in a roundabout way, introduces the plebiscite into our political methods, and which snatches from the Constitution the one element of stability and continuity which it contained.

'I should have accounted myself a criminal if, even by inertness, I had acquiesced in a novelty so big with perils. I resisted. I do not yield without having exhausted all the legal means in my power. To-morrow, in the ranks, by the side of the good citizens who have from every quarter of the country addressed to me the precious encouragement of their sympathies, I shall resume the struggle for liberty, for the Republic and for France.'

strength lies in the Chamber of Deputies and in the Cabinet. The President is an ornament, a social figurehead, a lender of dignity.

GERMANY: THE REICHSPRÄSIDENT

In 1919 Germany was compelled to create an entirely new set of institutions for the Federal Authority. The Revolution had announced the democratic principle, and during that revolution the parties of the Centre and the Left had asserted that that principle implied parliamentary government. The question then arose, what kind of executive would work well with a system of popular sovereignty exercised through representative government? The draftsman of the Constitution, Preusz, whose mentality we have already sketched elsewhere, had observed the various experiments in France, England, the United States and Switzerland, and had drawn certain conclusions, rightly or wrongly, from them. The result of his attempts to create something to suit Germany specifically was the production of a parliamentary Cabinet, and of a presidency of a hybrid nature, in which he attempted to secure all the advantages of the best experiments, and avoid all the disadvantages of the worst. He therefore borrowed a little from every system except the Swiss, which he emphatically rejected as irrelevant to German needs. How far the system which was then created will bear out the intentions of Preusz and his supporters we cannot now say, for the Reich has had so far little more than a decade of life, a good part of which has been spent amidst domestic disturbances and foreign pressure which have tended to give all institutions an abnormal shape. However, it is instructive to consider the original intentions and motives.

Neither a Swiss nor an American Executive. There was much reference, in the National Assembly and in its Constitution Committee, to foreign experience. The majority agreed that the Swiss system of a Directory elected from all parties to act as both the effective and titular executive was inappropriate for Germany, because such acute differences arose from the extent of territory, the variety of economic interests, the complexities of culture and religion and the strength of party spirit, that such a council could not possibly operate with the smoothness and harmony natural to a small untroubled country.[1] It was also urged, by the Conservatives, that such a system would by itself savour of anarchy, and inevitably cause the rise of a dictatorship. Against these arguments, which were decisive, the Independent Socialists urged that a presidency was anti-democratic, especially one with powers, for it savoured of autocracy, and they believed, though without good grounds, that the experience of Switzerland should be followed by Germany. On the whole, there was almost unanimous agreement that the Swiss example was not one which

[1] *Bericht und Protokoll*, p. 276 ff.

could be valid for Germany; its Cabinet experience since then supports the prediction.

On the other hand, Preusz determined that the American system of a President, vested with all executive powers and elected by the people, was impossible owing to its basic assumption, the separation of powers. He argued, rightly, that American experience proved that an executive severed from Parliament meant both spiritual sterility of the executive and Parliament's lack of executive stimulus and knowledge. He was, therefore, thrown back upon a system somewhere between the Swiss and the American, namely, a parliamentary Cabinet with a President at the head.[1]

The question is then, why should there be a President? The character of the presidency, as Preusz elaborated it, was copied with important differences, from the French presidency and the English monarchy. The important thing desired was parliamentary government, not parliamentary anarchy. To secure both democracy and efficiency it was necessary to secure, first, parliamentary government, and secondly, those additions to it which would prevent it from creating its own stultification. Here it was that French and English experience contributed their influence. To create a President—and this was desirable because a country of Germany's importance, with its international connexions and its large and varied domestic interests, *needed a personal incarnation*—it was necessary to avoid election by Parliament, as in France.

'The French system can be appropriately called impure parliamentarism. Pure parliamentarism presupposes, to be sure, two supreme political institutions of equal rank standing alongside each other; but it distinguishes itself from dualism in that these do not stand side by side in contradiction, but that parliamentary government constitutes the movable buckle between them. In a parliamentary monarchy the Crown stands beside Parliament. In a parliamentary democracy, in which all political authority issues from the popular will, the President can obtain an equal status with the legislature directly chosen by the people only if he is elected, not by the legislature, but by the people directly. His election and re-election are then independent of Parliament. All his governmental functions, however, he may only exercise with the responsible co-operation of Ministers appointed by him, yet dependent upon the confidence of Parliament.'[2]

Preusz asserted again and again that his intention was to create a counterpoise to Parliament, something which would be able to stand firm against the possible excesses of parliamentarism as these had been revealed in the experience of the French Republic.[3] Let us quote only one other short remark from his speech in the Constitutional Committee:

[1] Cf. *Denkschrift* and *Begründung zur Entwurf*, and *Bericht*, etc., p. 231 ff.

[2] Cf. *Denkschrift zur Entwurf*.

[3] In every one of his speeches before the full Assembly and before the Constitutional Committee this idea was expressed with extraordinary determination.

'It has been said that it is not necessary to have a counterpoise to the Reichstag, because the Referendum, and ultimately, the activity of the Councils, will produce sufficient counterpoise. That may be so. But to act as counterpoise against the Reichstag is only one of the functions of the President. There is also a more important one: to constitute a definite centre, an immovable pole in the Constitution. The more councils you have which are to co-operate, the more mass voting through the Referendum, the Reichsrat, the Works Councils, and so on, the greater the need for a strong point in which, at least in the idea, the threads will run together.' [1]

Preusz, therefore, created a President elected by the people. We may recall that popular election was considered by Millerand to be an indispensable condition of strengthening the French presidency, making possible the grant of important powers. Preusz was very emphatic about the necessity of popular election.

'The appointment of the Imperial Chancellor, and in agreement with him the other members of the Government, is the most important independent function of the President. A leader who issues from popular election, therefore, is most probably a man experienced in political tactics and can, when in doubt, more accurately weigh up the relevant political and technical circumstances, and make a decision, than where there is parliamentary choice. He who himself has issued from the people's will, may be expected to be able to judge more clearly and more accurately circumstances and persons, than a monarch who is separated from the people by birth and breeding, and can only see with the eyes of the narrow social circle surrounding him, and hear with their ears. Above all, he has to maintain his political leadership.' [2]

It will be noticed that the choice of a Ministry is designed to be real and that this is combined with the problem of the election of the President. They are both facets of the same thing, and Preusz fully expected the President so elected, and so empowered, to exercise, as his most important duty, the power of making Ministries and, withal, of not always going to Parliament for all of his Ministers.

At this point we might observe that Preusz's central theory of a counterpoise between Parliament and the President was founded upon observation of the weakness of the French presidency, whose power of dissolution had been abolished since 1877, and who, it was thought, therefore, could not withstand the fall of Ministries even when the ministerial crisis was a personal crisis among members of Parliament, without any substantial connexion with national policy.[3]

However, Preusz did not intend to make the President too power-

[1] *Bericht*, p. 277. [2] Ibid.

[3] This theory had been worked out by a writer named Redslob in a book on the parliamentary régime; it was carried, in our opinion, too far, as we have shown in previous pages.

It was held that since the President was himself the issue of election by Parliament he could not turn against his creators and Redslob himself called in the experience of England to show that their dissolution was possible because the monarchy had a position independent of Parliament and the parties, and that the threat of dissolution being, therefore, a substantial one, Parliament was obliged to reconsider any situation which might involve it in dissolution.

ful. He was to be strong enough only to accomplish the specific objects which Preusz had in view, and, therefore, lest he himself should stultify Parliament, it was made possible for Parliament itself to recall the President from office, the issue between President and Parliament then being left to the people to decide.[1] Moreover, it was insisted by Preusz that the President's power to dissolve, and to refer bills to the people, required the counter-signature of a responsible Minister.

In committee [2] the main questions raised related to candidature and term of office. Was a naturalized German eligible? Preusz urged this against the view that only the German-born should be eligible, arguing that no political leader capable enough to get himself elected, ought to be excluded, especially since it was possible that a candidate might have been bred in Germany for many years and be fully permeated with German culture and ideals. His view ultimately prevailed. Secondly, it was urged by the Independent Socialists that a seven-years' term with re-eligibility was too long, on republican principles, and could make way for a monarchy. It was urged by others, but unavailingly, that ten years was the minimum period necessary to strengthen and stabilize the presidency. Thirdly, long discussions occurred upon whether the President would be sufficiently strong if the power of dissolution required the Chancellor's counter-signature, or in his place, a Cabinet Minister's. Even members of Preusz's own party wished to leave the decree of dissolution without counter-signature. Against all arguments Preusz insisted that the responsibility must lie with the more directly responsible Cabinet. It seems not to be possible for a Ministry to advise the President to dissolve without signalizing their own responsibility by counter-signature, and we have no doubt that Preusz's point of view is the right one.

'If the President dissolves the Reichstag, and wishes to govern against the majority, then he cannot rule with a majority government. But he must obtain a counter-signature for his action. This action can only consist in this, that he attempts, by the new elections, to make the majority into a minority, and the minority into a majority. He must previously consider the question: which politically possible combination shall he use? He is compelled to undertake this political forethought—and for all concerned, it is the best way—by the fact that he is not allowed to act without ministerial counter-signature.'

[1] Cf *Constitution, Art. 43*: 'The President of the Federation remains in office for seven years. Re-election is permitted. Before the expiration of that term the President of the Federation may be removed from office, upon the motion of the Reichstag, by a vote of the people. The resolution must be carried in the Reichstag by a two-thirds majority. By such a resolution the President of the Federation is at once suspended from the further exercise of his office. The refusal of the people to sanction his removal from office is equivalent to re-election and carries with it the dissolution of the Reichstag. Criminal proceedings may not be instituted against the President of the Federation without the consent of the Reichstag.

[2] *Bericht*, pp. 231 ff., 274 ff. and 458 ff.

The process seemed roundabout, for if the elections go against the President he would have to get the old Ministry or something very like it again. Of course!

'This is what happened in the Melbourne-Peel case. This led to the strengthening of the parliamentary system in England. The instance is not merely a political curiosity; it goes to the essence of the problem. The President is unconditionally subject to the majority, he can attempt to make a minority into a majority by appealing to the people; but he must call the statesmen responsible therefor from the ranks of the minority. I therefore lay decisive weight upon counter-signature. . . .'[1]

Although the Constitution does not contain any article to the effect, yet it was Preusz's opinion, given in the Constitutional Committee, that the President ought to have the right to attend meetings of the Ministry, but without a vote.

Discussion on the second reading in the full Assembly did no more than recapitulate the opinions already indicated.

The Practical Status of the President. The Constitution says that the President of the Federation is elected by the whole German people, and that every German who has completed thirty-five years is eligible.[2] It will be noted that the term 'every German' has avoided the question which was raised in the Constitutional Committee, whether German born or German naturalized was required, and leaves it, as Preusz was prepared to leave it, to the discretion of the supporters of any particular candidate. It seems to me to be a certainty that in the matter of election to the presidency a natural-born German would have more chance of success than a merely naturalized German.

Election. The Article then says that details are determined by Federal Law. Such a law was passed in 1920, together with the details of electoral procedure.[3] The law settles a question which was raised in committee and in the Assembly with so many differences of opinion that the Constitution left the matter to be decided later. Preusz at first had suggested the following system: that election to the presidency required an absolute majority of all votes cast, and that if this absolute majority were not obtained at the first election, a second should follow in which the two top candidates alone competed. This is the well-known Continental 'second ballot' system applied to the presidency. It was pointed out in committee that this method would probably mean that two people who happened to have, rela-

[1] *Bericht*, p. 237. Another question raised was whether the Parliament should have the right to recall the President for actions against the spirit of the Constitution, as well as actions directly contrary to the law. The suggestion was rejected on the grounds that any attempt to define such a thing as the spirit of the Constitution would result in purely political differences of opinion, not susceptible of exact definition.

[2] Art. 41. [3] Cf. Kaisenberg, *Die Wahl des Reichspräsidenten*, Edn. 2, 1925.

tively to the other competitors, a large number of votes, but as yet not an absolute majority, would automatically be made the ultimate competitors, and this seemed to be undesirable if the President were to be the representative of 'the whole German people' in accordance with the first sentence of the Article. Various expedients were offered in its place, for example, the alternative-vote system. A way out was found: there is an election, and if in this first election, any one candidate obtains more than a half of all the valid votes cast, he is elected; but if there is no such majority, then a second election takes place (but it is not a second ballot of the kind mentioned above) and, in this, whoever has relatively the largest number of votes is elected. At this second election new candidates to any number are eligible. This means that it is possible for the votes to be scattered over a large number of candidates and that therefore one candidate may become President by a minority of all the votes cast. However, this method was thought preferable to excluding, by the Constitution, anybody for whom the German people wished to vote. It was desired to extend the range of possible popular participation, not to reduce it.

So far only one election has taken place under the Constitution. After the death of President Ebert, who was elected by the National Assembly, it became necessary, in March, 1925, to proceed to election. On the first occasion more than seven candidates appeared and the votes were very widely scattered, the first candidate, Jarres, a German National and German People's Party candidate, obtaining 10·4 million votes; Braun, the Socialist, 7·8 million, and Marx of the Centre Party, 3·9 million. No one had an absolute majority, and this meant that it was necessary to proceed to a second election.[1] It is interesting to see what then occurred.[2]

The Centre Party, the Progressives, and the Social Democrats (the Weimar Coalition) combined to support a joint candidate, namely, Marx; while the parties of the Right formed an Imperial Block. The issues raised were naturally The Republic *v.* Monarchy, and the question of social and class warfare. The Weimar Coalition urged that Marx was true to the Constitution, that he was no monarchist, that his supporters sought for no privileges in the State, that they stood against class government and for national unity, and that their candidate had, while Chancellor, demonstrated his capacity for office. The Right urged the need for a President with well-known national and Christian sentiments, with a feeling for the social unity of the country, who would put the Fatherland above party; a man who had been their leader, as Hindenburg, the candidate, had been, in

[1] It is interesting to notice that at this election the numbers voting were 69 per cent. of the electors—a small number compared to that usually voting at elections.

[2] The account which follows was taken from the very full account in Purlitz, *Deutscher Geschichtskalendar*. Cf. also Poetzsch-Heffter, *Jahrbuch des Öff. Rechts*, 1925.

trying times, and who would not forsake them in their tribulation. Hindenburg put these points in other words. He was not anxious for office, but duty called him. He had served the country as a soldier, and was willing to serve it as President. To him the nation was above parties. 'As a soldier I always had in mind the whole nation, not parties. They are necessary in a parliamentary State, but the Chief of State must stand above them, and act independently of them, for all Germans.' Long and peaceful work was necessary in order to nurse the country back to unity and peace, to permeate national politics and public life with principles of integrity. Marx, too, said: 'I see in the newly-elected Chief of State the mental reflection, but also the real guardian, of German national unity', and promised that he would strive to promote individuality, as well as community, in national life. All candidates insisted that they stood for national unity above any kind of sectionalism, territorial, racial, economic or social. Hindenburg was elected by 14½ million votes against 13·7 million of Marx, and 2 million of Thälmann, the Communist candidate. After Hindenburg had, as the Constitution demands, taken the oath of office (with voluntary religious ceremony) he described his conception of the presidential office.

He said:

'Reichstag and Reich President belong together, since they both directly issue from popular election. Only from this common source do they derive their fullness of power. Only both together embody our present associated, collective national life. That is the inner sense of the Constitution to which I have subjected myself on my word of honour. The Reichstag is the field where different world-conceptions and political convictions battle against each other, but the President ought to serve, above party associations, all the forces in our nation willing to contribute and create. I say expressly here that I will devote myself with all loyalty to the duty of marshalling our people and contriving their union. This great duty will be substantially lightened for me, if in this high Assembly, the struggle of parties does not revolve around advantages for party or factions, but rather around who can best serve our heavily burdened nation in the truest, most successful way, etc., etc.'

The implications are clear. Whatever the President's party, and whatever his private political views (and it must be remembered that both in Ebert's case and in Hindenburg's the President refused to sever himself from his political organization), the President avows his intention of acting as an independent judge and agency of the national interests, above party. As Hindenburg afterwards proclaimed to the people, 'My office and efforts belong not to any one class, nor to a race, nor to a religion, nor to a party, but to the whole German people bound together in all its parts by its onerous destiny.'

Let us continue the examination of the Constitution. Article 43 says that the President of the Federation remains in office for seven years, re-election being permissible. This requires no comment, except that

the amount of time is reasonable, considering that a good deal of the first two years must be spent in making acquaintance with official routine and procedure, and with the various political parties and personalities. The life of a German Cabinet is short, and a capable President who desires to participate in the creation of policy, has a sufficient term to consolidate his position and to make himself serviceable to the short-lived Ministries.

Article 43 also contains the provision for the recall of the President. It says that before the expiration of the said term the President of the Federation may, upon the motion of the Reichstag, be removed from office by the vote of the people. The resolution of the Reichstag requires a two-thirds majority, that is to say, so solemn an event as the recall of the President is not left to any chance majority of the Reichstag, but demands circumstances grave enough to provide the deliberate association of at least two-thirds of a quorum. Upon the passage of this resolution, the President of the Federation is prevented from the further exercise of his office, and after a period he submits himself for re-election. If he is re-elected, he begins his term of office again, as though he were elected for the first time. At the same time, the vindication of the President involves the dissolution of the Reichstag. This is an interesting clause, but its effectiveness has not yet been tried.[1]

Powers. The President represents the Federation in international relations.[2] The need of a country of the international status of Germany for representation in international relations was one of the reasons for the creation of the presidency. For reasons deeply embedded in human pride and vanity it is necessary for countries to impose their importance upon each other by certain external signs, and one of these is the Presidency, that is to say, an officer who does not pass through office with every gust of the political breeze, who is not to-day a thing of strength and to-morrow a thing of straw, perhaps even without a seat in Parliament, but a permanent representative and figurehead set in the very centre of government for a lengthy period. The letter of Hindenburg to President Hoover in July 1931 asking for financial help for Germany is a good illustration. The Constitution says that the President concludes alliances, and other treaties, with foreign powers in the name of the Federation.[3] He accredits and receives ambassadors. The declaration of war and the conclusion of peace are dependent upon the passing of a Federal law. Alliances and treaties with foreign states which refer to subjects of Federal legislation require the consent of the Reichstag. These seem altogether to be very large powers, but we must recall that the French President has powers just as large in foreign policy. Yet we have seen that although the French President,

[1] Cf. Art. 43, given in full in earlier footnote. [2] Art. 45. [3] Ibid.

in the course of over fifty years, has sometimes been instrumental in directing the foreign policy of his country, those occasions were rare and were possible only when the responsible Minister permitted presidential activity or used it as a microphone. Thus this and other powers are always tempered by the responsibility of the Cabinet to Parliament.

Article 46, for example, says that the President of the Federation appoints and dismisses Federal officials and officers where no other system is determined by law. He may depute these powers to other authorities. Now we know very well, and Part VII of this work shows abundantly, that the appointment and dismissal of Federal officials and officers are controlled by a large body of statutes which determine to the smallest detail the conditions of appointment and dismissal, and which provide guarantees regarding them.[1]

Article 47 says that the President of the Federation has supreme command over all the armed forces of the Federation. We must remember that the French Constitution gives the French President the power to dispose of the armed forces of the Republic, and that, as a matter of fact, the Minister of War and the military officials under his authority are actually concerned with and responsible for this particular task. A former Commander-in-Chief become President may exercise influence under this Article, but suppose the presidency comes to be held by a banker or a lawyer ?

Article 48 contains broadly two classes of function. One, Federal Execution, or the exercise of coercion by the forces of the Reich for states which do not fulfil the duties imposed upon them by the Federal Constitution or the Federal Laws, and, the other, the taking of measures necessary to restore public security and order where these are seriously disturbed or endangered within the Federation. The former power is an incident of a Federal State and re-echoes Article XIX of the Constitution of 1871. The latter we have shown, in a previous chapter, to be a consequence of the need for a continuous and uninterrupted co-operation of all vital factors to carry out their social functions in the modern State. It goes very far, permitting the authorities to abrogate either wholly or partially the fundamental laws laid down in the second part of the Constitution on the fundamental rights and duties of Germans. But the Constitution requires that the President of the Federation must, without delay, inform the Reichstag of any measures taken in pursuance of either of these powers, and those measures must be withdrawn upon the demand of the Reichstag. It has been suggested that in the event of continued Parliamentary deadlock the President could govern by virtue of this Article with-

[1] *Bund zur Erneuerung des Reichs. Die Regierung des Deutschen Reichs Präsidenten* (1929), pp. 16, 17. It is argued that this power makes the President a protection against the dismissal of officials by an incoming Government, on party grounds.

out Parliament. I cannot see how this can be done *within* the Constitution. For a Cabinet would, by the Constitution, have to countersign and accept responsibility; if it did not, then the Constitution would virtually be suspended. The justification for such a suggestion is the instability and internal weakness of German coalition cabinets.

The President exercises the prerogative of mercy for the Federation. Amnesties require a Federal law.[1]

We have already said that these powers must be considered in relation to the responsibility of the Cabinet to Parliament, and Article 50 makes the fundamental irresponsibility and powerlessness of the President plain. For it says that all orders and decrees of the President of the Federation, including those relating to the armed forces, require for their validity the counter-signature of the Federal Chancellor or the competent Federal Minister. An authoritative commentator observes that such counter-signature does not operate constitutively but declaratively, that is to say, it does not produce responsibility, it simply shows it.[2] The term 'competent' in the phrase 'competent Minister' may mean either that the matter to be signed lies within the scope of the Minister's department or that he has been made competent thereto by the Chancellor, or it may mean both, and it seems to me that practice has shown and will continue to show, that the latter interpretation rules, namely, that competent is what the Chancellor, as head of the Government, deems to be competent, otherwise it would be possible for a Minister to act contrary to the wishes of the Imperial Chancellor, to permit, formally, an act of the President to become good law, and then to leave it to the Chancellor to find an issue from the scrape. But given the nature of party government, it would seem ultimately impossible for the Chancellor not to be consulted on matters of this kind.

Article 50 is undoubtedly the ruling Article of the Section relating to the Reich President and the Government. Without it the President would be a dictator for seven years with a tremendous range of power; with it the law permits him only the power of personal influence. For though he may dissolve the Reichstag (Article 25), he may do so only once for any one reason. He is limited, therefore, in this very power and, further, his situation would indeed be invidious if he persisted in attempting to overthrow a Ministry because it would not countersign those things which he desired and they did not. It would be a direct inducement to the Reichstag to find a majority to overthrow him. He has a threat, and a good one, to a Reichstag which will not withdraw confidence from a Ministry which unrightfully stultifies his attempts at personal influence. But it is a threat

[1] Art. 49: 'The President of the Federation exercises the right of pardon on behalf of the Federation.'

[2] Anschütz.

which destroys itself the moment it is used, and any attempt to move by its agency inevitably brings trouble upon the President. We will return to the question of dissolution again presently, when we deal with the formation of Ministries.

The President and the Cabinet. Let us now turn to the actual relationship between the President and the Government. In the previous chapter we outlined and explained the relationship between the President and the Government. Though the articles appear to give the President a wide discretion in his choice of Ministers, and though, as we have seen, it was Preusz's emphatic desire that the President should have discretion in the appointment of the Chancellor and the Federal Ministers, we have learnt that the President is compelled to depend upon the distribution of party strength in the Reichstag. He cannot exempt himself from the operation of the party system in Parliament, and, therefore, however independent he is in the construction of a Ministry, Parliament is more independent, and ultimately more powerful in its destruction. Since this is so, no party leader is foolish enough to accept the President's invitation unless it is likely to be endorsed by the Reichstag, for politicians do not lightly take up lost causes. However, we have shown that, as between two or three coalitions, the President has some discretion and uses it, and experience shows that the President insists upon this right of a free choice, hoping, no doubt, to find a Ministry which, while maintaining the confidence of the Reichstag, is at the same time nearest his own particular political predilections.[1] Therefore, the Presidents have accepted the general principle that a practical

[1] Thus President Ebert himself went outside the ranks of Reichstag leaders in order to obtain the services (as Chancellor) of Luther and Cuno because he feared that the financial difficulties of the country could not be dealt with in the ordinary way. This choice was resented by the parties of the Left and was accepted by them because they feared that any protest or sabotage would discredit parliamentary government. So also Hindenburg and Chancellor Marx. Cf. Letter, 20 Jan. 1927, *Jahrbuch des Off. Rechts* (1929), XVII, 85:

'DEAR CHANCELLOR,—

'Foreign and Home affairs demand an efficient and strong Cabinet. The Cabinet will accomplish its work best if it can rely on a majority in the Reichstag. The formation of such a majority with the inclusion of the Left is, for the present at least, impossible; the attempt to form a Cabinet, supported by the Middle Parties only, has failed. I now request you, Mr. Chancellor, to undertake with the greatest possible speed the formation of a Cabinet on the basis of a majority of the middle-class parties of the Reichstag. I appeal at the same time to these sections of the Reichstag to lay aside personal considerations and differences of view in the interest of the country, to co-operate under your leadership and to unite behind a Cabinet which is determined to work neither for nor against single parties but for the good of the country, according to the Constitution. This new Government, even if unsupported by the parties of the Left, shall nevertheless have the especial duty, as in other national requirements, of protecting the legitimate interests of the great working population and, in the attempt to serve every class of the German people, solve the political, economic and social problems which confront us.

'Assuring you of my great esteem—

(*Signed*) HINDENBURG.'

and long-lived Cabinet is the first rule of Cabinet construction. As regards the right of dissolution, the President has used the power thrice on the advice of his Ministries, in order to clear the parliamentary atmosphere: where a Ministry has been too weak to exercise its authority owing to party divisions within Parliament, and where it has lived powerless but has not been given the *coup de grâce* of a vote of no confidence.[1] Further, the power has been used to maintain a government which, finding itself in difficulties, has sought to end them by resigning, with or without the threat of dissolution. In these cases the President has very promptly made it clear to the Government whether it may use the threat of dissolution, or whether it must consider itself obliged to do its best in the existing circumstances, dropping some parts of its programme and giving others the precedence where these have a majority in the Reichstag.[2] This has tended to secure the stability of Ministries.

Apart from the question of his connexion with Ministries the President is in a position to exercise political power, since both the right of presence at ministerial meetings and the right to information have developed.

Nor is this all. Certain occasions call forth declarations from the President and these have been consciously calculated to influence the course of policy. The ordinary occasions for such expressions of opinion are New Year's Day, Constitution Day (10th August), the Chancellor's birthday. On these occasions, receiving representatives of foreign powers, or the political and economic leaders at home, the President sounds the note of national and social unity and international co-operation, and regards the country as a unit deserving better treatment from foreign powers. Further, there are special events when the President utters the national sentiments as, for example, in congratulating the successful and condoling with the bereaved in national achievements or disasters.

On several occasions the presidency under Hindenburg has been tried. In 1926, during the campaign for the Referendum on the expropriation of the Princes, pressure was brought to bear on the President to state his attitude towards the plan of the Social Democrats to expropriate without compensation. Hindenburg, in a fashion impossible under the English monarchy, stated his attitude publicly, although couched in the form of a private letter to a correspondent.[3] He protested that to make a public declaration would be contrary to the spirit of the Constitution. Nor could he, on the same grounds,

[1] Cf. Chap. XXV *supra*.

[2] So called *Geschäftsführende Regierung* (i.e. interim, pending, or caretaking Government).

[3] Such private letters have, as one of their almost inevitable qualities, that of getting published at a time most appropriate for fell work.

send a proclamation to the Government; and the Government itself had already declared quite clearly, in an announcement, that it was against expropriation without compensation. He continued that he could not yet declare his policy if the Referendum proved to be successful. That could come when the duty was imposed upon him of actually executing the law, and then he very emphatically expressed his objections to the plan.[1]

The opinion of the President was solicited, but on this occasion refused, in the Referendum promoted by the German National Party against the Young Plan.[2] In the case of the Referendum on Expropriation it is said that Hindenburg's letter had an influence sufficient just to defeat it. In the second case, his refusal to oppose the Young Plan aroused the anger of the Conservatives, and promoted the parliamentary success of the project. A refusal to visit Prussia, officially, during a ceremonial tour in 1929, caused the Prussian Government to accede to his demands regarding meetings of the *Stahlhelm*, a patriotic organization.

There is no doubt that the President, as head of the State, is an element making for social unity. He is a common possession, and his frequent appeals for unity and the declaration of his own impartiality over against a distracted and divided Parliament, are political factors of the first importance. A weak and indifferent President might be merely a figurehead and a rubber stamp. It is possible, and it has happened, that both Ebert and Hindenburg, owing to their long experience of affairs, and to their strongly marked

[1] 'Yet, at any rate,' he said, 'I cannot refrain from giving you my personal opinion that I fully share the anxieties expressed by you, and I have already brought to the notice of the Government the same considerations as yours since the beginning of this affair. That I, who have spent my life in the service of the Kings of Prussia and the German Kaiser, consider this Referendum a great wrong, and, further, as a deplorable deficiency in feeling for tradition, and gross ingratitude, I need not explain in greater detail. But I will concern myself to deal with the expropriation project not as a political, but only as a moral and legal, matter. I consider it a very serious attack upon the system of the legal State whose surest foundation is regard for law and legally recognized property. It assaults the foundations of morals and law. If this Referendum were accepted then one of the foundation-pillars of the reign of law would be torn away, and a road would be opened which leads quickly and irrevocably downhill to the withdrawal or denial of constitutionally guaranteed property, if it should be subjected to the chances of popular vote no doubt passionately excited for the purpose. From the present case there might arise the method of proceeding along the line of expropriation by exciting the passions of the masses, and exploiting the needs of the people, and thereby to take away from the German people the foundations of its collective economic and political life. . . . I see in this a great danger. . . . I am convinced that, in spite of the strong and, in many ways, ugly agitation for the Referendum, the quiet judgement and the sound sense of our people will not mistake the moral and legal aspect of the matter, and will not fail to see the incalculable danger which threatens all. I hope, therefore, with confidence that our citizens will remember these considerations in the decision of June 20th, and will fend off the damage which may come to the first principle of a State—that is, Justice.'

[2] Cf. Pultz, *Deutscher Geschichtskalendar* (Inland), 1929, p. 230, where Hindenburg's letter of 16 Oct. 1929 is given.

characters, have participated effectively. Ministers are always prepared to listen to some one who has not only authority but wisdom and experience, and if a President cares to insist upon his power, he may not get his own way, but Ministers will not bear the sense of the danger of entirely denying his requests and overriding his scruples. Moreover, there is little doubt that Germany, which has for so long been used to an autocratic and bureaucratic system, to a system stable, if ruthless and irresponsive, is not prepared, for some years at least, to ride recklessly into a régime like that of France. There are enough people in Germany, sufficiently disgusted with parliamentary incompetence, to give the President an adequate assurance of authority to insist upon his point of view. That state of affairs does not exist in France and therefore, while in France Parliament and the groups and the Cabinet are everything, and the President is almost nothing, in Germany Parliament has not entirely usurped all the rights of government, nor has the President been reduced to a nonentity.

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IMPLICATIONS

The character of the office of Chief of State varies in different countries and the differences are due to the interplay of a vast number of forces operating over a long span of time, and the different purposes and qualities of the national civilizations of our own day. Yet there are certain common qualities, and the principal are, first, insistence on the need for a personage to act as the representative figure—the idol—of the nation. Secondly, for an officer who will stand above party. All modern political institutions, Parliament, the Parties, the Cabinet, supply the first need, but these have not the requisite qualities of permanence and fixity. Not that an elected President necessarily has these qualities, yet attempts have been made to endow the office with a sufficient permanence by a seven-year term.[1] But even if the term were not so long, the required political force to affect the people with a notion of the real existence [2] of a continuous community, the Nation, is obtained by the mere creation of the Institution designed —*supposed*—to supply it. The more of such common institutions, such collective hypotheses, even such collective self-deceptions, the more common experiences, the greater the sense of unity. Here is one more shrine, another fetish—serene above the changing fortunes of parties. It engenders loyalty and obedience to those who command in its name.

All is arranged to impose a sense of awe, grandeur and homage

[1] E.g. in France, Czechoslovakia (1920), Poland (1921), the President is elected for seven years; in Finland and Austria (1929) there is a six-year term.

[2] Cf. the doctrines of the Sacrament and the Real Presence in Christianity.

upon the worshippers, to provoke self-abasement.[1] Heredity is the most powerful of such agencies in the present state of human civilization, for the prejudice in favour of blue blood still exacts its tribute from merit, and will so for many generations. In default of this, solemn election by the people or National Assembly is established. Oaths are taken and faith is professed.[2] The flag, which for a thousand years has braved the battle and the breeze, flies above imposing palaces, and the national memories, of which it is the product and the symbol, are unconsciously connected with the Chief of State, as though his personal virtue had directly engendered them, and as though he were the sole and dependable saviour of the people who gaze upon it.[3] In the background are the Priests, murmuring their incantations in a perfectly schooled elocution, and in the rhythm of the tom-toms– a frequent accompaniment of Presidents and Kings— the names of God and Christ are frequently muttered. In primitive times (and to-day among backward races), the chieftain acquired a superhuman stature by walking upon stilts, or by wearing a large and grotesque head-dress, or by sitting upon the highest stone. His body and head were painted in motley colours and with mysterious signs, or else incense was burned to lull the senses of the adorers; or again, alleged relics and talismans were kept in a hut, cave or

[1] Cf. phrases used in addressing royalty, Farrer, op. cit.

[2] Cf. the Coronation Oath, administered by the Archbishop:

'Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Ireland, and the Dominions thereto belonging, according to the Statutes in Parliament agreed on, and the respective laws and customs of the same?

'I solemnly promise so to do.

'Will you to your power cause Law and Justice, in mercy to be executed in all your judgements?

'I will.

'Will you, to the utmost of your power, maintain the Laws of God, the true profession of the Gospel, and the Protestant reformed religion established by law? And will you maintain and preserve inviolably the Settlement of the Church of England, and the doctrine, worship, discipline and government thereof, as by Law established in England? And will you preserve unto the Bishops and Clergy of England, and to the Church there committed to their charge, all such rights and privileges, as by law do, or shall appertain to them, or any of them?

'All this I promise to do.'

(Cf. Anson, op. cit., Vol. II, Pt. I, p. 236.)

The Constitution of the United States (Art. II, Sect. I) provides: 'Before he enter on the execution of office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."'

The German President takes the following oath before the Reichstag (Constitution, Art. 42): 'I swear to devote my strength to the welfare of the German people, to further its interests, to guard it from harm, to observe the Constitution and the laws of the Federation, to fulfil my duties conscientiously, and to do justice to all men.'

It is permissible to add a formula by which to give the oath a religious sanction.

[3] Michels, *Elemente zu einer Soziologie des Nationalliedes*, in Archiv. fur Soz. Wiss. und Soz. Pol., 1926, 317 ff.

casket, and said to be capable of working miracles, while musical and gyratory hocus-pocus was practised with frenzied vigour. However, times have changed. Modern Chiefs of State do not rely entirely upon such barbaric expedients. Civilization progresses from the despised to the divine. Upon the Crown there is a Cross; the sceptre, attenuated and shortened, no longer looks like a club revengeful. Their place is filled by the continuous dinning ascription of supernatural qualities by the Press. Most of the old symbols have given place to words and touched-up photographs. Yet no constitution should rely upon these only: a Personage is required about whom rumours are credible: a handsome face, not too fine, a tall, and rather stout but elegant, figure (for height is by itself impressive, and it is perhaps a disadvantage to be without moustaches or a beard), a noble, composed bearing (by no means spluttering or fussy!), a Voice—these are not to be despised. There are other advantages, such as wide reading, many interests and compassions, and wit, but these are secondary, and their place can be filled by short appearances and reliable secretaries. Nor should the Chief of State ever appear without uniform, even if it is only a *frac*.

The Sceptre, the Throne and the Crown are blessed things, and any man who is dressed up not only acquires a new set of manners, which often surprise himself, but he impresses others, who are almost unawares shaken out of their daily common-sense, to fall upon their knees full of palpitating professions of obedience. It was said of Pitt that when he bowed to George III a spectator from behind could see the tip of his nose between his legs; then what urgent tremors may we not surmise in the hearts of the drab millions? Important events seem to be proceeding and all eyes and expectations are turned towards the common theatre. Palaces (think of Versailles, Windsor, Potsdam, and Schönbrunn), many servants, uniforms, medals, colours, orders, periwigs and gun-fire, are mightily impressive, for the whole world loves a show. Has there ever been a poor King? or President? The ordinary man cannot think continuously except through the medium of lengthy conversations; nor can the ordinary citizen grasp and retain impalpables—those gossamer threads which bind men together in the vast social web—except through the crude medium of a Person or Things: he requires continuous excitement by an external, palpable stimulus. It was a stroke of genius on Disraeli's part to create the Emperorship of India, and the Coronation Durbars. In such institutions there is a source of social prestige and distinction, and this contributes to the power and splendour necessary for their primary function: to incarnate the National Community so that the average mind may grasp it. Yet the necessary means produces Republicans, by repulsion.

Secondly, the Chief of State has been maintained as a corrective

to party government. The idea is constantly reiterated. What is its psychological root? We have shown how parties, by the fact that they are fighting organizations, necessarily fall into exaggerations. They boast and they pledge themselves. Not infrequently, the repetition of their boasts and threats, instead of revealing their essential faultiness, causes them to be believed as natural and true. Auto-suggestion and habit are reinforced by personal pride, and the fear of loss of prestige as a consequence of change of opinion. Moreover, the mere conduct of a battle causes the establishment of inflexible attitudes and personal animosities. They do not contribute to the welfare of the nation, but rather unhealthily sharpen proper differences. In these circumstances it is useful if a Personage, represented to be the spokesman of the nation above parties, occasionally holds up a mirror in which the leaders may recognize their distortions, and suggests the essential good discoverable in counter-propositions.

PART VII

THE CIVIL SERVICE

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'If there were always at the head of the administration a man whose comprehensive genius embraced all the circumstances, whose responsive and flexible mind knew how to conform its plans and wishes thereto: who, endowed with an ardent spirit and a tranquil reason, were passionate in the pursuit of the good, and calm in the choice of means: who, a judge upright and sensible of the rights of different classes of the community, knew how to hold the balance between their pretensions with a steady hand: who, conceiving a just idea of the public weal, promoted it without precipitation, and, considering the passions of men as a fruit of the earth, proportioned their development to that of eternal Nature, and set up no picture of perfection except to excite his own courage and not to irritate himself with the obstacles. . . .'—NECKER.

'Nothing goes by itself: that is one of the errors of administration.'—NAPOLEON.

CHAPTER XXVII

GENERAL CHARACTERISTICS

THE function of the Civil Service in the modern state is not merely the improvement of government; for without it, indeed, government itself would be necessarily impossible. The Civil Service is a professional body of officials, permanent, paid and skilled. Its numbers are a measure of the activities of the State, and an indication of its nature. We attempt to describe the general nature of the Civil Service, its development in several states, and its contemporary problems.

I

GENERAL ASPECT

Few doctrines are more productive of error than that which avoids the solution of the difficulties of State activity by abstractly relying upon 'institutions'. It is certainly a valuable gain made in the written and oral teaching of the last twenty-five years that the too familiar abstractions 'Sovereignty', 'State', 'Government', and many others, have been at once reduced in their traditional authority over our minds and enlarged in body and perspective to mean concrete institutions. But our problems are by no means solved, for 'institutions' may themselves become an abstraction—the next easy way out of the obstinate problems of government: a refuge instead of an answer.

We are compelled to face the fact that institutions are nothing more or less than men. No institution rises above the quality of its inventors and personnel. The ultimate possibilities of solving problems of government lie in the nature of the men and women who compose the institution. Plato did not err when he concentrated upon the training of his Guardians, and much political thought since his day has been a re-discovery of his supreme insight.

Modern governments assign the rights and duties of government to almost all 'uncertified' people over 21 years of age. Our inquiry into the practice of government has already included the voters and their representatives. It must now proceed to consider those among the population who have adopted the service of the State as a professional career. We have, indeed, already made it plain that the

efficacy of State action depends not upon the professional servants of the State alone, but also upon the psychology and resources of the general population among whom they work. It is equally true, however, that be the population and their resources never so favourable, the quality of State action can be reduced to a base level by the unsuitability of the professionals and their organization.

Indeed, this problem tends more and more to outweigh any other in the modern state and even to assume a critical importance. For real government, the actual and immediate application of political power to cases varying from one person to the whole population, is carried on by the Civil Service, and not by the People, Parliament or Cabinet.[1] How far does a close view of the apparatus of public administration warrant such a judgement of the importance of the part played by the Civil Service ? The answer to this question hangs upon two considerations : the nature and the extent of State activity, and the comparative contributions therein of the politician and the administrator.

It must already be quite clear that the salient feature of modern government is its positive and wholesale activity. That does not mean that in earlier ages the State either theoretically or actually abandoned a positive part. We have seen, on the contrary, that this was not so, and that, in fact, the State from its inception onwards claimed and exercised the power to regulate and control social activities over large territories and wide fields of human enterprise. Except for a short period, from about 1800 to 1832, State action did not slacken though it may have been incompetent. It is highly probable, also, that the regulatory power of the State will go on increasing, perhaps for centuries. That which is novel about modern State activity, and that which, also, causes us to believe vaguely that it is an entirely fresh phenomenon, is its extent and method. With the exception of the period of Colbert and Louis XIV in France, of Elizabeth and Burghley in England, and Frederick the Great in Germany, nothing like such modern regulation of human activity has been attempted outside ancient theocracies.

Further, this activity differs from the old in its scope, its minuteness, and its instruments. In scope, it hardly fails to envisage any branch of the moral or material sides of human endeavour. The record is written on the roads, the gutters, and the buildings, and spells what the State has done in order that society may have a modicum of wisdom, protection of person against criminals and mechanically-propelled vehicles, and environmental and personal

[1] Cf. Weber, *Parlament und Regierung* (1918), p. 14 : 'In the modern state the real government effectuates itself neither in parliamentary debates nor in royal proclamations, but in the exercise of administration in daily life, necessarily and unavoidably in the hands of the civil service.'

defence against deadly bacteria! The annual thousands of Rules and Orders, the detailed and present plan of activity of all modern States, reveal how the State concentres upon each individual and weaves his every impulse into the myriad-threaded warp of its existence. No second in the day is unprovided for; and for the many simultaneous events of each second there is the exact and predetermined form or officer. Though some may not admire, few can fail to wonder at, this vast, involved scheme which no single mind has ever completely analysed in even a thousandth part of its extent. The State is everywhere; it leaves hardly a gap. But its difference to-day from, say, the eighteenth century, is, that whereas in that century it could do little more than claim power by the issue of Statutes, Orders, Proclamations and Rules, now its own professional servants calculate, control and apply those commands. Where the State was wont to issue a Proclamation, it nowadays deputes an officer. The difference is a difference of organization, and only slightly of intention. Few States have imagined that to command was enough; but no States until the eighteenth century began to employ public administrators on a scale sufficient to make the command effective. Even in the eighteenth century only one State, Prussia, had arrived at anything like our modern perception of public administration managed by a force of people, especially and systematically trained, recruited and paid, to the exclusion of any other occupation, to execute the commands of the State.

The Civil Service is as much the product of the spiritual and mechanical factors of Western Civilization as all other political institutions. When the idea of progress set men contriving the instruments of release from the conditions of their day and of escape to a better future, one instrument—I think I may say the most potent—among many others was Government. Not theories of government were needed in 1800; the world has hardly improved upon the store then existent, and we are still governed by the Ancients and that brilliant line of thinkers who gave lustre to the eighteenth century. Not theories of government were needed, but Mechanism. The French Revolution came when it did because two centuries of war and prodigality had prevented the establishment of an adequate administrative apparatus. The activities and purposes of the Prussian State survived, because, in the same two centuries, the rudiments of sound public administration, crude and grim as they were, had been built. Bentham and Chadwick were no less the characteristic English product of the same age, as Alexander Hamilton was the American. The nineteenth centuries turned away from the impotent survival of unsalaried, untrained officers, who, as the records of the seventeenth and eighteenth century show, were illiterate and unwilling, whether of the common people, the lesser gentry, or the nobility, and gradually

the 'honorary' officer ceased to play a part in translating the commands of the State into social and individual behaviour.

For two things were realized, though not uniformly in the countries under discussion. The first is that a rational order in industrial effort and organization demands the inclusion of all the best-skilled elements to do the required work, regardless of their social position, religious beliefs, political party, and (more recently) their sex, and the exclusion from the administrative apparatus of all those with such adventitious qualities, but lacking the specific skill. These qualities still count for something; self-government and local patriotism are things of account, the inheritance of the status and salary established by an ambitious and capable forbear, religious sympathy and political faith, have not ceased to be successfully weighed in the scale against talent. But the tendency towards economic rationalism which triumphed to such a degree in the field, the factory, the office and the stock exchange, triumphed also in the creation of the Civil Service. If the Idea of Progress, and the striking conquests of nature by Machinery, produced the notion that the State ought to undergo the same kind of renewal as industry, then economic rationalism purged the mind of irrelevant obstacles that had counted for a good deal in the past.[1]

Contributory, in the second place, to the growth of the modern apparatus of administration, was the realization of the social advantage of division of labour. More conspicuously in the nineteenth than in any other century, did people group themselves into trade and professional categories moved by the vague sense that only in this way was the maximum amount of skill and productivity attainable. Society could now obtain the High Standard of Living which had become its God, by the knowledge and use of scientific technique functioning in a highly complicated organization. This technique could only be acquired in its minutest exactness, and practised with the highest efficiency, if people undertook only as much as could be mastered. . . . One branch of such science and art was administration or management, and such a profession of administration could be exercised either under private employers or the State. Indeed, recent discussion[2] goes far towards assimilating private to public

[1] 'The service should be looked upon, not as a means of rewarding friends, but simply as an organization for the transaction of public business, and as such should be conducted on "business principles".'—G. E. Casey, *Canadian Monthly*, Jan. 1877, p. 87, cited in Dawson, *The Civil Service of Canada*, p. 39.

[2] Cf. Jones, *Administration of Industrial Enterprises*, London, 1925 (note especially Chaps. VII–X); Drews, *Verwaltungsreform und Berufsbildung der Volkswirte*, 1930; Batschi and Others, *Staatsreferendar und Staatsassessor*, 1927; Mosher, *Public Personnel*; Scott and Clothier, *Personnel Management*, New York, 1920; Henri Fayol, *Industrial and General Administration* (International Management Institute, Geneva. London, 1930); Bruck, *Das Ausbildungsproblem des Beamten in Verwaltung und Wirtschaft*, 1926.

THE GROWTH OF CIVIL SERVICES [1] (CENTRAL AND LOCAL [2])
1821–1929

Year	GREAT BRITAIN [3]		FRANCE [5]		PRUSSIA [6]		GERMANY [7]		U.S.A. [8]		Year
	Civil [4] Service. Thousands.	Population Millions	Civil Service. Thousands.	Population. Millions	Civil Service Thousands	Population. Millions.	Civil Service. Thousands.	Population. Millions.	Civil Service. Thousands.	Population. Millions.	
1821	27	*14·1*	—	*30·4*	[1800 23	*11·6*	—	—	8	*9·6*	1821
1841	17	*18·5*	90	*34·2*	[1850 25	*15·0*	—	—	23	*17·1*	1841
1861	59	*23·1*	248	*37·4*	—	*18·5*	—	—	49	*31·4*	1861
1881	81	*29·7*	379	*37·6*	152	*27·5*	452	*45 4*	107	*50·2*	1881
1901	153	*37 0*	451	*39·0*	250	*35·0*	907	*56·9*	256	*76·0*	1901
1911	644	*40·8*	699	*39·6*	342	*41·0*	1,159	*65·4*	370	*92·0*	1911
1921	958	*42·8*	1,212	*39·2*	390	*38·1*	1,753	*63·2*	597	*105·7*	1921
1928 [9]	1,024	*44·7*	1,008	*40·7*	443	*39·1*	1,187	*64·4*	609	*122·7*	1928
Occupied Population	—	17·2	—	21·7	—	12·5	—	32·1	—	41·6	

[1] *Caution.* In spite of the greatest care and use of the best sources, these figures are only approximate. It is highly dangerous to compare those for each country in different years (since census methods and scope have varied), and even more dangerous to compare the figures for different countries since here even the definition of Civil Service varies. We have attempted to include all paid, professional, full and part time servants of the Central and Local Authorities, *excluding* Military and Naval Services, Judges and Magistrates, Police and Teachers. We have *included* all other servants *whether 'established' or 'unestablished', whether administrative, clerical,* manipulative, or 'industrial' (i.e. postal and railway workers, for example), whether drawing salaries, or fees, or wages. The task has been exceedingly difficult, and there are errors and uncertainties. A fascinating history could, of course, be written, recounting *why* the growth we record took place.

[2] We attempted originally to include only the servants of the Central Authority, but France and Germany lump *all* officials together, their method was followed in order to get the major amount of comparison possible.

[3] Census Returns, Occupational Analysis (1861–1921); for 1928, Treasury Memoranda to Royal Commission on Civil Service, 1929, with 1921 figures of Local Government Servants.

[4] No Local Government officials included until 1861. In earlier years there were none; later, not available, until 1891. The apparently astonishing leap after 1901 is due to the inclusion of large classes of 'additional' workers, i.e. mainly industrial and manipulative. The census, before 1911, was unsatisfactory on this score.

[5] Computed from *Bulletin de la Statistique générale de la France*, Oct. 1913, article, Lucien March, 'Contribution à la Statistique des Fonctionnaires'. Figures for 1841 are those for 1839, and are *Central* officials only; figures for 1861 are really for 1866. Figures for 1921 are from Census (*Statistique Générale*), I, Pt. IV, for 1926, from information supplied by Lucien March, of the *Institut de Statistique de l'Université de Paris*.

[6] Figures for 1800 and 1850 represent Central officials only, and include police. They were supplied by Ministerial direktor, Dr. Arnold Brecht, of the Prussian Ministry of Finance, with reserve. Thenceforward to 1911 by computation from the *Statistisches Jahrbuch für den Preussischen Staat* which began in 1903. Figure 1921 from *Baanten-Archief* (1921) with allowance for Local Government; for 1928 from *Finanzstatischen Teil der Statistischen Korrespondenz*, Berlin, Oct. 3, 1930. Naturally, the Prussian figures are from 1871 onwards a constituent part of the Reich's. They must not be added together.

[7] Occupational Census in *Statistik des deutschen Reichs, Neue Folge*, 1882, 1895, 1907, 1925. For 1928 the analysis in *Wirtschaft und Statistik*, 1930, p. 650. When the Prussian figures are subtracted from those of Germany (which includes all the States, all the Local Authorities, and the Federal Government) the figure remaining is one for all the other States and Local Authorities and the Federal Authority.

[8] *Statistical Abstract of the United States*, 1930, *Table* 177. *This is for the Federal Authority only.* To find the full number of American Central and Local Services would involve discovering undiscoverable figures of the forty-eight States and all the Local Authorities.

[9] A careful analysis of the latest figures for each country appears on p. 1182.

officialdom for purposes of scientific analysis. The activities of the State grew enormously for reasons we have described elsewhere, and with them, naturally, the managerial class necessary to carry them out. It is clear, then, I think, that the growth of some of the cardinal and least-questioned principles of modern civilization brought about the establishment and growth of a professional Civil Service, and that the realization of those principles would have been impossible without such a service. If, in the future, the world rejects those principles altogether or modifies them, we may expect changes in the size and nature of the instrument by which the State effectively imposes its will. With such a change of outlook we shall have to reckon, but in this discussion it must be deferred until we have dealt with what is immediately before us and what is likely to arise in a future not too remote for fairly accurate speculation. Nor must we forget the part played by the democratic urge of 'the career open to the talents', produced by the belief in the equality of men, the desire for freedom of opportunity and hatred of the official privileges of the aristocracy.

Modern States, then, directly employ very large numbers of people who make the service of the State a life-long professional matter. It is impossible to find the numbers at different stages of the nineteenth century with accuracy, but these figures are approximate, and from 1880 onwards very closely, to the truth.

It seems clear that these numbers are destined to increase; and there is hardly a question of any permanent decrease. For modern industrial and social technique has not yet yielded its full in the form of large-scale organization which requires State intervention, while the political intentions of the combined non-Conservative parties point directly to an increase of State activity.

The part played in government by the Civil Service is, then, of tremendous importance. In what respect are they governors? What is their part relative to that played by those other and elected elements who stand in the closest connexion with them?

We have already discussed the contribution of the Electorate, Parliament and the Responsible Executive, to political decision. We saw that in the place of Montesquieu's Separation of Powers the facts have imposed a theory of the uniformity of purpose in governmental institutions, depending for their effectiveness upon the very reverse of the Separation of Powers, emphatically demanding, indeed, their integration. In that integrated scheme of human endeavour we observe not separate, but different, functions carried out by different groups of human beings.

These groups are the *People*, the *Parties*, the *Representative Assembly*, the *Cabinet*, the *Chief of State*, the *Administrative Services* and the *Judicial Service*. Each has its own function, which, however, is

merely an integral part of the whole activity performed by all together. Whether, in fact, each does its part, and no more or less than its part, competently or incompetently, with a conscious realization of what it is doing, is a question of fact which must be decided by the statesman or student from time to time. That the experience of government teaches that arrangements must be made for differentiation without conflict, and co-operation without checks and balances, is a matter of elementary knowledge.

The Administrative Services can, in fact, be divided into a number of branches. But the division which chiefly interests us at present is that between the Administrative, the Technical, and the Manipulative, and we concern ourselves here mainly with the Administrative officers and particularly with the highest grade, in closest co-operation with the Ministers emanating from popular election.[1]

The earlier discussion in the chapter on the Separation of Powers has explained the politico-administrative connection. The business of the electorate, of parliaments and of Cabinets is a double one: it is compounded of Conflict and Propulsion. They undertake to overcome popular opposition to their schemes for using the national resources, and by a multitude of devices, from academic discussion to the ruthless use of violence, they make their scheme effective. Those who triumph, and thereby come into possession of the legitimate power of the State, could, it is conceivable, employ their own party-followers to help them to carry out their policy, and for centuries, in fact, this was considered good politics and adequate administration. But this practice was made impossible by the growth in the scope and detail of social policy, the division of labour, which, claiming the continuous energy of men in a set and special field, reduced the number of potential party rank and file, and by the need for technical skill. Thus the political power acquired by electoral victory, or through the influence of the privileged, had necessarily to be distributed among the few who acquired authority to command, and the many who were permanently employed to obey by the best technical means. Because the authority of scientific technique has so won its way among all sections of the population it is now an almost universally accepted idea that those who professionally serve in a technical capacity can do so without affecting policy, or if they affect policy, that they do this impartially, without political tendencies and intentions and as a result of the sheer scientific value and significance of their advice and their assistance. They are the human transmitters of general forces and laws and nothing more. It is because a dozen or

[1] Broadly, the Administrative servants are those occupied in the general task of preparing or executing policy; the Technical those who lend the aid of special scientific knowledge and training, like dentists, engineers, lawyers, architects, mathematicians, etc.; the Manipulative include all those who execute orders handed down by the first two classes by common physical activity.

a score of men cannot to-day affect millions of people without a large body of servants and much machinery, and because it requires a vast range of science, which the politician does not possess, to accomplish this, that we say that though Parliament, the Cabinet, and the Presidents may reign, the Civil Service governs.[1] This holds good of England, France, Germany, and the U.S.A., especially, since their civilization is highly developed and complicated, and, in proportion as government and civilization are developed in the Western European fashion, in other parts of the world, do the same phenomena appear. Differences exist, which may be ascribed to historical influences and contemporary ideals, and where these differences are of special significance they will be discussed. Racial influences as differentiating factors in the status and organization of Civil Services exist, but very great discrimination is required to discover where race ends and environment begins.

II

NATIONAL ATTITUDES

The general aspect of the Civil Service, as we have stated it, hardly affected the political science of the nineteenth century. The Civil Service was always a problem to the politically conscious and a frequent plague to the ordinary citizen. To the scientific student of political institutions, however, the subject apparently offered little attraction until about 1880. This date coincides with two developments which inevitably brought the Civil Service and its problems into full view of a much larger number of citizens than hitherto. Around about 1880 there raged the great Individualist-Socialist controversies which we have indicated in the chapter on the Conditions of State Activity. Concurrently with the assumption of new activities by the State and the development of old ones, the numbers of Civil Servants in the countries we are specially studying mounted more rapidly than before.

To the Continental countries the problem of the Civil Service in the nineteenth century was one of bureaucracy and anti-bureaucracy, centralization and anti-centralization. Since the middle of the fifteenth century at least, the pretenders to central authority had sought to extend their power by regulations, and through their own officers, over town and country. The lack of administrative knowledge led to faulty organization and consequent abuses. Bad transport and communications prevented knowledge from reaching the centre, and vigour and correction from affecting the extremities. Financial and banking institutions and theory had not reached the stage where the onerous tasks of tax-levying and collection could be accomplished with the greatest economy and administrative convenience. Neither opinion nor institutions permitted the citizen the

[1] Cf. Flood, *Journal of Public Administration*, 1923, pp. 122–3.

redress of manifold abuses. These centuries were suffering the usual reaction from anarchy: over-organization; that is, for the anarchy of the dissolution of feudalism an over-mighty central power had substituted itself. Only in the nineteenth century was Western Europe shaping the institutions which would embody the critical theories of the eighteenth. It is no wonder that the Continent, and France in particular, saw, in the Civil Service, the embodiment of bureaucracy and centralization. This attitude acquired its character not from a systematic science of public administration, but from experienced *malaise*. It has dominated French thought until recent years; and still has a powerful influence. In Germany a similar attitude was prevalent, although the proven capacity of its administrators blunted the edge of dissatisfaction and criticism. As a social class the Service was in France regarded rather with contempt and envy, in Germany it was regarded with pride as an honourable career.

The English attitude towards the Civil Service in the nineteenth century was much the same as that on the Continent, but it was not the result of an actual experience of bureaucracy. On the contrary, it was owing to the previous lack of bureaucracy—to the habit of being governed by the unpaid illiterates of the country-side, that Englishmen had developed an exceptional sensitiveness to bureaucratic pretensions. The growth of commerce and the commercial spirit in England produced a strong disposition for *laissez-faire*, and Adam Smith's formulation thereof influenced most of the ruling minds of the first half-century. Further, Englishmen could look out on unhappier lands abroad, especially on France, and could see that the land of revolutions was the land of bureaucracy. Again and again in the history of English institutions in the nineteenth century reform was retarded by the plea that in a centralized system popular revolt must needs exert its whole pressure upon a single objective which, if it succumbed, would succumb totally, whereas a decentralized system might fail in one part but would resist in others.[1] The Star Chamber was not forgotten; and 'immemorial liberties, and rights of self-government' were always remembered until the low price of good government extinguished scruples. Nevertheless, a strong feeling against bureaucracy existed, and coloured thought about the Civil Service. Bagehot first discovered the importance of No. 10 Downing Street, but he had nothing to say about the Civil Service, although its ultimate task-master, the Treasury, is housed on the opposite side of the street.

In the U.S.A. the Civil Service, in both the Federal and State governments, attracted an interest different from that in European

[1] Cf. Cornewall Lewis, Evidence before the Select Committee on Parochial Rates, 1850; and Hansard, *Debates*, on local rates and the grant-in-aid between 1870 and 1888.

countries. To those who were energetically occupied in realizing the philosophy of Samuel Smiles in commerce, and industry, and settling the Frontier, it was the object either of a deep unconcern or contempt. To the practising politician the Civil Service was the Heaven-sent manna for the reward of the party rank-and-file. It was 'spoils', and as a problem of 'spoils' alone it was treated by political scientists. Bryce's education and American experience combined to reduce all he had to say on the Civil Service to ten pages.

The nineteenth century, in fact, in all these countries, was filled with the noise and heat of discussions about political obedience, authority, the merits and demerits of democracy. It pursued the topic of political rights and the organization of political conflict. The administrative problems were left to the administration itself, and where these have any vigour—as in England and Germany—a solution was approached, but where the administration was not interested in its own reformation—as in France and the U.S.A.—it became so defective that even the agitation and reforms of the last forty and fifty years have not yet cured the infirmities.

Even since 1880 little more has been done than to discover problems, and this judgement holds good even of the Prussian and the Imperial German Civil Service which had received a large amount of theoretical and practical attention on its technical side, but had not benefited from the adaptation of its character to a democratic and modern political environment. But of that, later. In the period since 1880 an increasing amount of attention has everywhere been directed to the Civil Service. Yet it cannot be said that the discussions have been systematic and unbiased. In England literature has concentrated on the need for safeguarding the liberty of the citizen against the encroachments of the Executive.[1] More recently, and perhaps with more animus, controversy has raged around the comparative quality of private and state-managed enterprise. The Estimates of course, here as everywhere, are the occasion of annual protests against the steady increase of the total of Civil Service salaries, and the money spent by them in the execution of State services.

America has almost outgrown the days when 'Spoils' was the principal feature of the Civil Service; that has become largely a page or two in the more advanced history books. But there is still enough 'spoils' to occupy attention to the detriment of more technical discussion, and the Presidential right of dismissal, as a threat to the best realization of the 'merit' system, diverts much energy. Students, however, are becoming more occupied with the problems which are subsequent to the introduction of the 'merit' system—the post-natal problems, as it were. Gradually, the problem of the Civil

[1] So in Dicey; Muir, *Peers und Bureaucrats*; Belloc, *The Service State*; Hewart, *The New Despotism*.

Service has ceased to be simply an unfrequented path leading out of the main problems of the Separation of Powers which have vainly bothered Americans. With their characteristic pioneer spirit and fervent belief in scientific method, they have turned to discover the best scientific ways and means of recruitment and classification. In some respects the soundness of their theories is in advance of the rest of the world. But not the same can be said of their practice, and this difference between theory and practice is likely to remain until Americans have as much faith in government as they have in laws.

The recent theoretical attention to Civil Service problems in France has advanced little beyond that of the earlier decades of the nineteenth century. Of course, the problem of securing competence has impressed itself, since about 1880, with ever more marked emphasis, upon political thinkers. French thought upon this subject, however, still tends to wallow in the ancient trough of discussion about the theory of the Separation of Powers, and the more recent one of Syndicalism. The constitutional theory of the Revolutionary Period, the development of corporate feeling by the Chambers, the prevailing sentiment against the bureaucratic and executive abuses of the *ancien régime*, renewed from decade to decade by the fresh accounts provided by a Taine, a Tocqueville and scholars like Chéruel, Clément, Babeau, Lavisse and Funck-Brentano, the legacy of suspicion and hostility left by nineteenth-century struggles with the Executive, whether legitimate monarch or plebiscitary adventurer, all these crowd out the investigation of the real problems of administration, and cause students to concentrate upon the theory of the Separation of Powers with narrow dogmatism, or to lament the continued existence side by side of Caesarism and Democracy. Frenchmen—if we follow their literature and everyday discussion—are interested in the creation of a democratic spirit in administration, the removal of the arbitrary character inherited from before 1789.[1] This has involved the Chambers, Civil Servants and students in a struggle for or against Trade Union or 'syndicalist' rights for the associations of Civil Servants, who want them as a means of improving their material and moral position.[2] No less momentous discussions have arisen around the problem of safe-guarding the rights of the citizen against the abuse of official power by the civil servants, and of the individual Civil Servant against infringement of his economic and other rights by his colleagues—or superiors. There is a large literature on the 'juridical control of the administration', which is the effect of the development of the jurisdiction of the *Conseil d'État*, which again has been promoted by

[1] Cf. André Thiers, *Administrateurs et Administrés*, 1919; Favareille, *Réforme Administrative*; Ferrand, *Césarisme et Démocratie*, 1904.

[2] Cahen, *Les Fonctionnaires*; Lefas, *L'État et les Fonctionnaires*; Harmignie, *État et ses Agents*.

theoretical jurisprudence.[1] This is a remarkable development to which we shall devote some attention later; but it is not an unexpected development; for wherever the democratic control of the bureaucracy is either denied or defective, a judicial institution fills the void. It is to be expected that people will seek the redress of grievances in any court, and wherever now or in the future, democratic assemblies cannot directly afford such redress they will necessarily become positive or tacit accessories to the creation of courts which can. We may already observe such developments in England and the United States.

The years since about 1900 have shown in Germany more progress than in France. Sociology, and especially the sociology of government, has fast developed, and won many victories over the young men. The way opened for the discussion of two questions of fundamental importance: the relations of Parliament to the Civil Service, and the training and the recruitment of the highest branch of the Civil Service. The last twenty years have witnessed revolutionary changes in both these respects, and we shall soon have occasion to consider their evolution and estimate their present importance.

THE NATURE OF CIVIL SERVICE ACTIVITY

We must now attempt to answer the question: what general qualities distinguish the activity and organization of State servants? and we may do this by describing them with comparative reference to the qualities of private industry. In this way we shall discover the features upon which to fix our attention.

1. **The Urgency of State Services.** Not all the services rendered by men to each other come equally under control of the State. Some, indeed, are entirely uncontrolled by the laws. There are very few of such services. It is easier to see the varying extent of control, which ranges from the official registration of contracts to the actual stipulation of prices and the management of industries; from the cleansing of a street to the compulsory isolation of a fever-stricken citizen; *from the application of general principles of 'public-policy'* to the compulsory supply of certain services. . . . What impelled men to force the State to take upon itself these functions? These functions were undertaken because they were so essential to the maintenance and continuation of the state desired that their organization could not be left to the privately established institutions of individual persons. This was shown by experience. The earliest functions of the State, the maintenance and extension of itself by war and internal police, required special institutions which should occupy themselves continuously so as to acquire the necessary *expertise* and the aloofness and permanence which are essential ingredients of

[1] E.g. Alibert, *Le Contrôle Juridictionnelle d'Administration Publique.*

authority. This ultimately meant unity of organization upon as large a scale as possible. Individual men were not allowed to name their individual price for the consumption of such services as this; and it was impossible to calculate a price, for in matters of life and death prices lose their meaning. Nor could there be any certainty that when the need was great enough to call forth an enormous price the supply of defence would be improvised, and, if improvised, that it would be of proper quality. No enduring work was to be accomplished without a sense of security. Fresh motives were later called into play as discovery and activity added to human possibilities, and as they were added, State functions accumulated. Fear, pride, pity, charity—and a hundred other human elements—operated along devious and amazing ways to cause men to demand the large-scale, socialized and permanent organization of certain services. Such were the relief of the destitute and the organization of the labour market, the provision of public health services, free education, the building of highways, the running of postal services, and many others. All these services have certain common qualities. All have a quality of urgency, an urgency which takes its tone from the publicly accepted philosophy of the time. They are urgent because a high standard of living is desired, or because illness or death may result from their absence, or because—we do not quite know why—it is morally right, and here our reasons border on the mysticism of religion and are supported by vague conceptions of God, Progress, Evolution, Reason, World History, the Future, and many other things to which we have as yet given no name. When the urgency of these desires seems unlikely to obtain satisfaction from the independently created organization of individual men the State is asked to shoulder the burden. And so the State, as we have already said, becomes many things: a Telephone and Telegraph, and Postal Company, one enormous Hospital, an Army, a Navy, an Electricity Supply Company, an association for the organization of trade relationships with other countries and within its own territory, an Information Research Service, a giant School with many grades, an Insurance Company—the list of the State's incarnations is inexhaustible. But the State is incarnate because there is a special urgency about each of these services. It is a risk, nay, a peril, which the majority of inhabitants cannot contemplate undertaking (so experience has shown), to leave private, unco-ordinated activity in charge of such services. Hence the special emphasis upon continuity in the public services; the tendency to keep governmental activities immune from judicial control and punishment; the great prestige attaching to official appointments, with the frequent corollary that men serve with their highest energies regardless of monetary reward; while with some the power flies to the head, and their conceit issues in disobliging, 'bureaucratic' behaviour.

2. **Monopoly and No Price.** That is the quality which marks the activities of the State—urgency, or public safety against what our social philosophy deems to be a danger, and even in the most unlikely places, like the Postal Services, or the Medical Services, which appear to be of an ordinary business nature, the element of public urgency enters: some groups are *compelled* to behaviour in order that others may benefit—as in compulsory notification of disease, or 'unprofitable' rural postal deliveries. Thence arise certain secondary characteristics. The services are completely, or almost completely, *monopolies*; and the State renounces almost completely charging the consumer a price, or a direct *quid pro quo* for value received. It treats all its clients alike, and does not charge what the markets will bear, or make a profit on one citizen to recoup itself for the loss on another. The public services operate, fundamentally, to make universal provision of a necessary service to all who need it. The principle of price in a competitive market full of competitive consumers is discarded.

Since the State has a monopoly its service cannot be judged by the results attained in like industries operating outside State control, nor can the citizen threaten to find a competitive service of supply: since it charges an equal price to all, or no price whatever, a quantitative estimate of value is lacking, the consumer is deprived of the ordinary means of expressing his judgement. As a rule, the consumer measures the difficulty of earning, or the unwillingness of parting with, his money, against the satisfaction he anticipates from a commodity or service he desires. He can pretty flexibly register his judgement of the comparative value of different quantities of goods at different prices by means of a price paid or withheld. His demand, and the anticipation of his demand, cause the production of goods in the special quantity and quality and time called for. The supplier who meets the conditions profits in proportion as he meets them; he who does not, tends to become insolvent. There is a fairly *direct* relationship between efficiency and profit, value and payment in the free operation of economic enterprise. Price—the index of efficiency and value—is quantitative. Solvency is a sensitive and automatic indicator of past success and a regulator of future enterprise. It automatically decides where, when, and how, and how much, goods and services shall be produced.

In the services performed by the State there is no such index. Its reasons regularly transcend individual judgement; that is why the State performs them. The resources are not acquired voluntarily in direct proportion to the service immediately rendered, but compulsorily from the general revenue of the country on a broad judgement of how much it is desirable to spend made by the representatives of the people and their technical advisers. The measurement

of the value of State services is made by institutions, like parliaments, which may appropriate a sum to be spent in a certain time, but have not so far been able to make every shilling as certainly obtain its full utility as some private industries.[1] The distance between the consumer and the producer is occupied by intermediaries, the parties, the parliaments, the cabinets, the Civil Service organization itself, who weaken the full force of consumers' demand, even of the consumers' need. Mistakes can be recouped out of the revenue, and explained, as we have shown in a previous chapter on parliamentary control of the Executive, without the possibility of timely, informed, or decisive criticism. Who, for example, can decide between disputants over the nature of God? Where can a measure be found of the desirability of a reduction of the death-rate? At what point should the interests of 'future generations' be preferred to those of the present? How much is 'France's prestige abroad' really worth? Do the direct and indirect results of the attempt to enforce Prohibition in the U.S.A. merit the expenditure of human and material resources thereon? How much would it be worth the while of Frenchmen to improve their public hygiene? Would it be worth while extending the present system of public control over the coal and potash syndicates in Germany? What would the postal revenues amount to, if it were not for the social necessity of serving rural districts at a price much higher than the cost of the services, and how far ought such a burden to be borne? Between the minimum and the maximum answer to these questions a hundred gradations are possible; and in the upshot the representative assembly makes only one of them effective. We have already seen the conditions under which such decisions are made; they are makeshifts, large, immobile, inflexible, and but inexactly responsive to the desires of the people or their parliamentary representatives.

Since they have these qualities it is clear that the everyday control exercised over the executants of the policy thus paid for is not likely to be either exact in relation to policy or purchased at the lowest possible price. For the inability exactly to measure attainment by the ultimate employer, the people, or the immediate one, the representative members and Ministers, has its effect all through the ranks of the Civil Service, operating primarily through all those who are in managerial positions, whether they are the higher administrative officials or the foremen in workshops. It depends upon these whether the necessary discipline is exerted upon the executive and manipulative workers who are the ultimate units in the execution of State projects. Up to a certain point they bear financial responsibility to no one, for their financial responsibility cannot be accurately measured;

[1] The total utility of State activity may be much greater than of all private activity together, because its largeness of scale and its own general authority produce economies which even the stupidest administration cannot entirely destroy.

and within the margin of uncertainty or inexactness they may be inefficient at the expense of the taxes. Within that margin there may, of course, operate other incentives which secure a return for money greater than what is given in private enterprise, and the strength and potentiality of those incentives will be the subject of later discussion. But whether they are operating or not is measurable, so far, only very roughly. No accurate way has yet been invented of assaying the relationship between the output of the State and its revenue. We have already, in previous chapters, examined in detail the instruments by which the work of the Civil Service has hitherto been measured: the parliamentary investigations of various kinds in England; the inquiries of committees and commissions in the United States, France and Germany: the informal deputations from interested groups; the formal and permanent representation of interests in the Departments; and the Treasuries and Ministries of Finance. And we are beginning to see, in fact, that it is difficult for any one but an expert fairly and effectively to criticize an expert; and it is one more sign of the governmental predominance of the Civil Service that in order that the member of Parliament shall be able to criticize it effectively he needs oral or written coaching by an expert from the Civil Service as to what points need criticism. The instruments of criticism move towards precision, and tend to rate ever more accurately. Yet a certain sternness and persistence is absent in the spirit and methods with which this purpose is pursued. For the result does not immediately *affect* each individual member's comfort and solvency as such an examination does affect that of each individual consumer and producer. The ultimate loss of the former is, perhaps, some votes: that of the latter is certainly of welfare which could have been obtained without extra effort had the judgement been sound and the inquiry vigorous. The former cannot rate values so exactly as the latter because his tests—the electoral, the representative assembly tests—are *linguistic*[1] or *polemical* tests, in spite of recent improvements in parliamentary technique, while the test of the latter is one of hard cash. Not that the politician's test may not sometimes be applied more fervently and call out all his talents and hopes, or that the Civil Servant may not love and know his work so much better than any man working for a personal money profit, but the question now is not so much one of incentive, as the ability to measure the extent of satisfaction or dissatisfaction. Further, as we shall show later, the bodies set up to supervise and control the Civil Service, cannot possibly do so with exactness—there are too many immeasurables—and this results again in the inability

[1] Hawtrey uses this term in *The Economic Problem*, XXVIII, p. 348, but in another sense; but I think, that having regard to the controversial nature of Government, *polemical* is nearer the truth.

to rate the value of one servant's work against another's—there is neither pressure nor standard.

Since, then, it is impossible satisfactorily to measure, and therefore control, the final product of the Civil Service from the outside, it is perfectly clear that the hope of efficiency in the Civil Service depends more specially than in private industry upon conscious steps to secure that all the elements in its composition shall be of the best quality; efficiency cannot be regulated by the automatic test of solvency as in private business. If we cannot be sure that a system of external control will bring about the production of desirable results, then the nature of our desirable results must immediately determine the qualities we look for in the men admitted to the Service. It is of the highest importance that only the fittest shall be selected and promoted, and that the conditions of discipline, reward, social status and civic rights shall foster clever and zealous activity. The need for this is at present recognized in different ways and degrees by different countries.

2A. **Equality of Treatment.** We have already observed that public administration does not exist to make a profit, but to render services wherever they are most urgently needed. Inevitably the principle of equality imposes its demands upon officials: they must be fair, they must favour no one above another, and are only to be guided by the equal application of the law. This principle is not stated in any British statute, nor do I believe it is a common law principle, but it undoubtedly weighs powerfully in the public mind. In France and Germany the principle is actually declared; the German *Constitution* says,[1] 'All Germans are equal before the law. . . . Public privileges or disadvantages of birth or rank are to be abolished;' while in France the jurisprudence of the *Conseil d'État* is thus summed up by Jèze,[2] 'All individuals fulfilling certain conditions, fixed in a general and impersonal manner by the organic law of the service (law, rules, general instructions) have the legal power of demanding the service which is the object of the public service: this is the principle of the equality of individuals in relation to public administration.' These principles exclude partiality: do they exclude adaptability? They do not in theory; but they tend to in practice. Both in Germany and France scope for discretion is allowed, this discretion itself being subject to the principle of equality, which means difference of treatment only on reasonable, but not arbitrary, grounds. As State activity increases, this principle of fundamental equality with appropriate difference becomes of more and more importance in the relationships of public and service. It excludes differences of treatment which are liable to creep in, such as political antagonism, sex preferences,

[1] Art. 109.

[2] *Les Principes Généraux de droit administratif*, Vol. III (edn. 3), p. 20.

religious and class differences, but the very serviceability of official action requires that there shall be differences of treatment according to the nature of the time, place and person.

3. **Limited Enterprise.** The Civil Servant's enterprise is not free: he does not possess all the opportunities of initiative, or the incentive thereto, which pertain in private industry.[1] The duties of a Civil Service department are laid down by the law, and they are not expansible by the energy and inventive powers of the Civil Servants. In other words, what Civil Servants shall undertake is not and cannot be determined by themselves. The taskmaster is Parliament; for the electorate, this settles the limits of official effort; to go beyond them, is not merely not rewarded, but may be punished because it is illegal. It is of no use the Civil Servant thinking and contriving beyond a certain sphere: the law impedes. Moreover, salaries cannot be easily increased by the offer of a new product; it is many years before an idea can get itself accepted and realized. Things are easier in private industry. The effect on the mentality of the Service is discouraging: that in private industry continuously encouraging.

4. **Large-scale Organization.** Civil Service activity is usually of a vast wholesale quality, both in terms of the numbers with whom it deals and the extent of the area over which it rules. Economy requires the smallest possible proportion of servants to the citizens to be served, and this inevitably implies the judgement of situations and the expression of commands and suggestions in writing. The activity is *impersonal*; contact with the immediate and quickening realities—persons, places, gestures, and the quality of the voice—is lost. Hence, slow and inappropriate action, and a tendency to regard the realities which one rarely sees as not actually existent.

5. **Public Accountability.** Civil Servants are public servants, and by the operation of the principles of responsible government they may be called upon to answer for any of the thousands of actions undertaken every day. The repute and justification of each department are bound up, of necessity, with its records. Its policy upon any issue must fit in with precedents, since each like group of citizens must receive equality of treatment. Therefore the Service is obliged to be slow in decision, to spend considerable time upon the keeping of records, to leave no flaw in its past in order that it may have a tranquil future. Hence a congenital tendency to 'red tape' *paperasserie*, and *Vielschreiberei*, and a special fear of rashness.

6. **'Establishment.'** The rather inflexible determination of the scope and nature of State activity by the Cabinet and Parliament, the

[1] Though we admit, of course, that with the extension of large-scale industry and commerce in monopoly conditions, the distance between public and private enterprise narrows. Yet the field of small-scale private activity is still the greater part of economic life.

impossibility of prompt and frequent resilience, result in the conception and practice of an 'establishment', that is, a carefully-graded hierarchy and number of posts with duties and salaries to match. This is not normally alterable or escapable, so that Civil Servants affected by the public atmosphere of free and developing industry which surrounds them, and faced with an almost certain prospect of no exceptional changes in their favour, become very sensitive about promotions, and their morale can become pathologically affected unless special attention is paid to the equity of the promotion system.

7. **Graded.** Both the impossibility of accurate money-measurement of the Civil Servant's output, and the ultimate impossibility of parliamentary control of finance unless based upon a few simple, unchanging standards, impel to the creation of grades or classes of servants. Parliamentary control would be quite impossible if every head of a department had the right to bargain with each servant on an independent basis. This may cause great unfairness as between one kind of duty and another, and at each great reclassification innumerable appeals are lodged.

8. **Direct Governors.** Since the Civil Service is concerned with the direct execution of government in relation to the citizens, since it is immediately compelling, it is naturally disliked. All groups in the State feel that their burdens are more significant than their gratifications from membership of it. That is a universal tendency of human nature. The bearer of ill tidings, moreover, is not seldom personally blamed for the disaster. There must always seem too many Civil Servants in such a background: they must always appear to be officious and hard of heart: and the gratuities which they have to bestow must always seem to be slowly and grudgingly given. There are few citizens, indeed, who can see into and beyond the action of an official, and detect the ultimate groups and interests upon whose behalf he is, in the last resort, acting in any particular instance.

9. **Not Ruthless.** The Services do not act primarily to make a *profit. They are largely philanthropic institutions.* Many services were assumed by the State on philanthropic grounds, and, in recent years, to improve the condition of the worker, pained by the insecurity of his economic lot. Ruthlessness is banished, because it is believed that the State ought to be a 'model' employer, and further, the 'established' nature of the Service tends to exclude personal competition. Hence, 'once in the Service, always in the Service'. Neither colleagues nor superiors care to speak with harsh judgement of each other or subordinates, personal reports are not frankly discriminatory, disciplinary power is seldom employed, and dismissal as a penalty is exceedingly rare. It becomes a special concern, then, to discover the conditions of zestful, inventive work, *within* these limits.

10. **Anonymity and Impartiality.** The modern system of

ministerial responsibility and of changing Cabinets, unequivocally demands that Civil Servants shall do their work without personal public blame or praise for policy, and that they shall act with impartial, but enterprising and unrelaxing, helpfulness to governments of any party complexion. This involves certain rules and standards of conduct to be obeyed by both Ministers and Civil Servants, and especially affects the methods of recruitment, the political and economic rights of Civil Servants, such as candidatures and the right of association, and concerns, too, the methods of redressing their grievances.

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These generalizations are gathered from the historical evolution of administration in various countries, and the analysis of the contemporary position of civil services in the modern state. We proceed to discuss (1) the history of the services in order to reveal the growth of their problems and especially of their general character, and (2) the nature of their present-day problems.

Analysis of Most Recent Figures (including Police and Education) [*see p.* 1167].

Great Britain (1929)		*France* (1926)		*Prussia* (1928)		*Germany* (all States and Reich) (1928)		*U.S.A* (Federal only)	
Central		*Central*		*Central*				Post Office	314,795
Industrial Workers	122,000	General	38,000	General	15 788			Navy	50,575
Manipulative Staffs (mainly Post Office)	178,500	Public Works	117,000	Tax, Finance	10,431	*Reich*		Agriculture	23,995
Messengers, etc	16,500	Taxes, Customs, Registration	71,000	Police and Law	126,383	Civil Servants	96,681	War	47,267
All other Grades	117,000	Posts, etc	161,000	Education	16,293	Permanent Salaried	26,303	General	151,033
Local (for 1921)		Various	6,000	Industry and Transport	9,126	Industrial	50,193		
Administrative and Industrial	*686,966	Railways	590,000	Industrial	14,991	*States*			
Police (1921)	72,157	Industrial	166,500	*Local*		Civil Servants	335,574		
Teaching	224,309	*Local*		General	135,568	Permanent Salaried	47,209		
		General	92,000	Police	14,020	Industrial	34,969		
		Police, etc	46,000	Teaching	99,659	*Local*			
		Teaching	177,000	Industrial	114,464	Civil Servants	329,717		
						Permanent Salaried	100,784		
						Industrial	166,495		
Totals	1,417,432		1,464,500		557,123		1,187,925		587,065

* This figure may be too large in comparison with those of other countries since it includes Tramways, Harbours, Docks, Piers, etc.

CHAPTER XXVIII

ORIGINS AND GENERAL CHARACTER: GERMANY

WE now seek to deepen our understanding of administrative problems by reviewing in broad outline the administrative experience of a number of countries. The analysis pursued in the next chapters is confined to history: it is good to observe how problems arose; and we leave to later pages the comparative treatment of contemporary problems. The final institutional questions are for all countries very nearly the same, for the creeds and material foundations of their civilization are practically the same; but each country has its own history, each its own direction and pace in the course of the last three centuries, and, therefore, the point of view from which they regard modern questions and the experience with which they ask them are different. The conditions of good health are uniform, but the invalid's interest in them is determined by his special malady.

Germany. The country with the longest serious study and experience of a Civil Service and its problems is Germany. That experience was all the more valuable, academically speaking, in that it was the product of many states independent of each other, yet teaching each other, and employing Civil Servants trained in the affairs of neighbour-States. What I have to say here is the common heritage of Germany, but in the main it refers more exactly to the history of Prussia. The character of that influence is known to all the world as 'bureaucracy'. This was more the outcome of historical accidents than inborn temper, and, now challenged by the sovereign popular assemblies, it is likely to change its nature within a generation or two. No biological feature stamps Prussia as inevitably bureaucratic, but merely a remediable accident of organization in the past. Ancient purposes compelled her to forge bureaucratic instruments. The political error was not that such instruments were ever used, but that they were retained after their primary purposes had been accomplished.

If, from an early date, the German Civil Services were bureaucratic, they were also regarded as professions conferring great honour upon those who followed them. Indeed, in every State the Civil Service was the most honoured profession, though in some, like Prussia, the

higher military services were considered slightly superior. It was not snobbery that set this standard, but service and the expectation of service to prince and people. The honour and the profits of the Service went originally to the hereditary nobles, but in later ages actual service in the profession brought ennoblement with it. Nor was the efficiency of services left to chance. At a time (1723) when England and America in this respect were barbarian, and France profligate, rules of training and recruitment were formulated in Prussia which successfully provided efficient staffs. Indeed, it is plain that energies as mighty as those which England devoted to the creation of Parliamentary institutions were in Prussia turned to the establishment of administrative institutions. While England was founding the Constitutional State by the bloody struggles between the Stuarts and Parliamentarians, Frederick William, the Great Elector of Brandenburg, in struggles as bloody, consolidated his State, uprooted the remnants of feudal administration and created the administrative organization indispensable to an efficient absolute monarchy. In 1688 when the Great Elector died, his legacy was an army and a Civil Service; in 1688 when William of Orange ascended the English throne the English reward of a half-century's efforts was a sovereign Parliament. Thenceforward the cleverest young men in England passed (or did not pass) from the Universities to the political parties and the House of Commons, while the clever young German, whether a Bavarian, Prussian, Hanoverian or Saxon, passed through grade after grade of actual and diverse administrative service, to become a statesman. Each system has its advantages and disadvantages, and each its philosophies. Political science in England maintained the turn it had taken prior to and during the Parliamentary struggle: it concerned itself principally with the question of political liberty and obligation. In Germany Cameralism, or the Art and Science of Government by Administrative Departments (*Kammer*), attracted the best minds of the seventeenth and eighteenth centuries.

Recruitment. In Germany attention was early turned towards the problem of recruitment. This is, of course, the vital problem of the Civil Service. All depends upon the quality of the servants, and this is, to a large extent, governed by the terms of recruitment. For the rules of recruitment ultimately set certain standards which educational systems must seek to satisfy—which, in fact, historically considered, they have sought to satisfy. Yet formal education is only a part of the qualities tested by rules of recruitment. These cannot ensure perfect equipment by education and the development of character in social intercourse, for they may demand too much; but at least they set a standard of expectation. Necessity and chance, as in all growth, had a large share in directing earnest attention to recruitment. The earliest formally qualified Civil Servants were the

so-called 'hired Doctors' (*gemietete Doktoren*) of the late fifteenth century. They were councillors forming part of the permanent or occasional entourage of the prince, and learned in the law.[1] There was, of course, no systematic organization of recruitment; the doctors of the law were engaged as they were needed, in the same way as were knights, clerics and university professors, Lombards and Jews—for longer or shorter periods, for piece-work, as we might say. For the business of the rudimentary state did not require *continuous* services: in that it differs vitally from the modern state. The majority of the Court officials who constituted the Civil Service of the time were men of high ecclesiastical status and of the nobility. The activities of the doctors varied with time and place; no such thing as a permanent and specialized set of duties then existed, but they were in specially close co-operation with the office of the Chancellor, who was keeper of the archives, the composer of State documents and later the highest judicial official and negotiator with the ambassadors of other states. These learned Councillors were usually in the employ of more than one Court. It is interesting to notice that with the institution of 'hired doctors' there was introduced in Germany that connexion between the Civil Service and legal training which is characteristic of that country, and which has fallen in the course of time from being its highest glory to being, perhaps, its gravest defect. It was not until midway in the next century, the sixteenth, that more extensive steps were taken towards a specially skilled Civil Service; for then, the need produced the institution.

The full social and political force of the New Learning now began to be felt and the reign of great states was beginning. The Universities began to exert a vivifying effect upon intellectual life, and the State to develop from the private 'estate' of the Prince—the *seigneur*—into a more public thing. Bavaria was especially early in forming an administrative organization which operated all over the country under central supervision. One set of officials acting in the localities in the service of the Prince were concerned with military, police and miscellaneous duties, including supervision of the municipalities, a second set being specially occupied with financial affairs, and a third conducting the administration of police, though, in the primitive division of powers, this included many things which we should to-day call administration. Students of English local government history are aware how indistinguishably intermixed were the administrative and judicial duties of the Justices of the Peace in their various types of Sessions. These central officials who, in Bavaria and other states, acted locally, were a powerful instrument of centralization owing to their education, which made them the frequent arbiters in disputes

[1] Cf. Isaacsohn, *Geschichte des Preussischen Beamtentums*, I (Berlin, 1874); Lotz, *Geschichte des deutschen Beamtentums* (1909), pp. 33 et seq.

between powerful men, town, gild, and estate councils. Most of these officials were nobles, but in proportion as learning was required for the execution of their duties and as legally trained *bourgeois* became available and tended to be preferred by the anti-feudal centralizing princes, the nobles were gradually forced to acquire a modicum of skill, either by formal instruction at the Universities or by making the Grand Tour (*Kavaliertour*). The Kings of Prussia used their ordinary citizens and nobles alternately; until centralization was accomplished the burgher was preferred to the noble. An oft-quoted proverb, current in the seventeenth and eighteenth centuries, was to the effect that in Prussia importance was laid upon the pen, not upon ancestors, since one found it impossible to discover whether a document had been drawn up in the blood of a noble or a burgher. The nobles lost ground rapidly in the two official categories where reading, writing, arithmetic and legal skill were required, that is, in the financial and the judicial offices. Even the latter was for long the almost exclusive possession of the nobles since it was only with difficulty that the holding of courts of justice was transferred from its feudal proprietors to the central authority. For the office of defence and maintenance of the peace the non-learned, warlike noble was sufficient unto the time.

Two troubles afflicted Germany at this date which required more than a subsequent century of effort to eradicate. The one appertained more to Brandenburg and Saxony, where large estates were common, than to the lands west of the Elbe. The large estate-owners were made the royal officers in these areas, and they were paid, as most officials then were, not in money, but in kind, the special kind for the chief local officials being the produce of the royal domains. The economic interest of these estate-owning officials tended to overcome their principles of good administration, and it became necessary to separate the economic management thereof. At the same time, the actual property of the noble was by no means completely under the direct government of the royal authority. A second danger threatened, one, indeed, which, as we shall show later, entirely demoralized French public administration for two critically important centuries: the sale of offices and the alienation of jurisdiction. Under this system the office became, in the rudimentary condition of financial administration of the time, an easy means of producing revenue. Like everything easy which does not follow Nature, it was heavily paid for in unexpected ways. A great deal of the State's field of administration was delivered over to private proprietors and towns. But Germany was energetic enough to purge herself (not entirely) of hereditary jurisdiction and sinecurists by 1700 while France succumbed.

The Reception of Roman Law. From the beginning of the sixteenth century Roman Law exerted a powerful influence upon the

civilization of the Continent.[1] It taught the absolute authority of the *princeps*. The authority and the justice of the latter were pitted against those of the Estates and Localities, and the principles taught in Bologna and Padua, Milan and Venice, were matched against native customs, and not only found a spiritual home in the Universities of Cologne, Erfurt and Leipzic, the latter a veritable manufactory of Chancellors and Civil Servants, but caused the growth of a large popular literature of legal handbooks. The Reception which took place over a period of two and a half centuries, can be said to have reached its completeness about 1550. The uncodified, largely unwritten and uncertain law of the Germanic States, varying from place to place, and Court to Court, and hardly deserving the name of application, since the subjective feeling of justice of the judges was paramount and unconnected with general principles, gave way gradually to a unified, crystallized, codified set of legal principles, the logic of which decided the fate of any particular case. Since the new social and cultural conditions and the widening extent of commercial intercourse were best promoted by unity and certainty, the mental discipline and administrative consequences of the Reception were welcomed. The Courts of Law and administrative positions were opened only to schooled lawyers.[2] There began that close and continuous and fruitful connexion between the Universities and the Civil Service which has not yet ceased and which other countries began to organize only about three centuries after this time.

At the same time officialdom was influenced by the new conditions of commerce and law in other important directions. The Councils of the Prince received a more permanent and systematic organization than before, and both sessions and the division of work became more regular. The learned officials began to be paid in money and their contracts with the Prince provided for their tenure and superannuation. To their character of mere servants of the Prince's person they added that of servants of the public, for in the fiscal and other arrangements they made with the Estates, the Prince's opponents, they had to render justice not only as between Prince and Estates, but as between the various branches of the Estates. The official councils became the resort of those who sought prompter justice than the occasional circuits of the courts could give, and by the end of the sixteenth century such official councils to advise the Prince were accepted,[3] and were by the Estates demanded, as indispensable to good princely government. Their cosmopolitan learning, their wide experience, their conceptions of sovereignty made their temper anti-Estate and anti-local. Since they were schooled they could be turned to a variety of jobs, and

[1] See Stintzing, *Geschichte der deutschen Rechtswissenschaft, Erste Abteilung*, pp. 21 et seq.; Holdsworth, *History of English Law*, Edn. 2, IV; Stolzel, *Brandenburg-Preuszens Rechtsverwaltung und Rechtsverfassung* (1888), Vol. I, Erster Teil.

[2] Stintzing, op. cit., pp. 52 et seq. [3] Cf. Lotz, op. cit., p. 58.

in the consequent rotation they learnt the art of administration. Their centralizing spirit earned them the hatred of the Estates for, following the deliberate policy of the Princes, they were frequently not natives of the State, but foreign-born, since these were more likely to side with their master than with the Estates. Officials of the kind we nowadays call subordinate or in Germany *subaltern*, were drawn from the middle class, obtained experience in town administration and had a grammar-school education. They sometimes reached the highest offices. The manners of the time included the receipt of presents as well as fees.

The Seventeenth Century. It is in the seventeenth century that we can better see the growth of the modern state exerting its inevitable influence upon the Civil Service. The Civil Service was the royal answer to feudal pretensions and local patriotism. As loyalties and services were withdrawn from their feudal and local possessors they were transferred to the centralized Civil Service. It was not Brandenburg but the Austrian States and later Bavaria which first showed these features. The Habsburgs, Maximilian I and Ferdinand I, built up a central administration on the principles created earlier by their family forbears in Burgundy. Broadly, they combined almost complete centralization with careful, deliberate and clever organization of the various central councils. A central financial and budgetary system, a Privy Council for high politics, a central and supreme judicial court were set up. The higher councillors and the secretaries, clerks, paymasters and registrars were forbidden to enter the service of other states and financial probity was enjoined. All this organization, as a matter of fact, limited royal discretion. It became common in the other Germanic States, just before the beginning of the seventeenth century, though with variations dependent upon their cultural and economic development. As in Bavaria, so in the other States, the administrative centre of gravity was the Exchequer (*Hofkammer*). The Exchequers then laid down financial policy and drew up financial legislation, they were the controlling authority for the royal domains, an appreciable source of wealth and power in a day when states were small. They collected the State revenue and administered its debts. They fostered handicrafts and trades and markets, planned tariffs and were the personnel authority. In Bavaria the Exchequer became the central point of the economic system, for State activity was then not characterized as 'interference': it seemed to be the expected and natural process. In Hesse-Cassell the Exchequer registered estates and incomes, supervised forestry, controlled the State mines, the woollen industry, customs duties, coinage and salt manufactures, and the accounts of local officials. The Reformation threw further duties upon the State: viz. education and poor-relief.

Prussia. Prussia, which was, at the beginning of the seventeenth century, far behind Bavaria in many ways, now commenced to develop rapidly until it became the foremost state in Germany, and an example to the rest. Its exemplary and brilliant progress was largely due to the same kind of accident which in France led to deplorable results—the accident of birth. Between 1640 and late in the eighteenth century—let us say until the French Revolution—Prussia had the fortune to be ruled by four kings of whom three had administrative genius of a high order: the Great Elector, Frederick William of Brandenburg (1640–88), Frederick William I (1713–40), and Frederick the Great (1740–86), reigned in all for about 110 years.

It is almost impossible to appraise sufficiently the importance of these years of intensely energetic administrative drive. This directing force came at just that epoch in the life of the State when it was most urgently needed, that is, when all the spiritual and economic interests of men demanded a medium for their realization which the towns, counties, duchies and other small and separatist areas of government no longer adequately afforded.[1] It came at a time, too, when its results in terms of administrative organization were bound to have an influence stretching as far as the institutions and mind of the nineteenth century. The Thirty Years War caused tremendous material, spiritual and institutional damage, and it threw upon the survivors the burden of reorganizing at least the revenue and military system. The State was extended in territory and population, and thus the number of Civil Servants within a single organization increased. It increased, too, because there was ascribed a field of activity to the State not again equalled till recent years. The Sovereignty and *jus eminens* of the princes, which now obtained an absolute form and suffered decreasingly from challenge, was linked with the positive character of the State. A new technique was demanded, for the contemporary economic processes and morality required promptitude in judgement, honesty and energy in administration, intellectual equipment of the Civil Servants, and a reform of the old councils and Chancelleries. The economic-cum-administrative science of Cameralism began, and it taught the importance of a trained Civil Service.

Prussia was given a great impetus 'to strengthen the Civil Service as the concrete means of unity, as the chief organ of State unity'.[2] The Privy Council was in 1657 divided into a large number of departments which specialized in their own field of activity. Under the Great Elector the energizing and decisive factor in the system was the Privy Council which reserved important questions for the Elector's decisions. This form of government, in which the Privy Council

[1] This is, perhaps, most brilliantly described in Schmoller's famous essay, *The Mercantile System.*

[2] Schmoller, *Der deutsche Beamtenstaat in* 17 *und* 18 *Jahrhundert*, in *Umrisse und Untersuchungen.*

predominated and where decisions were made by the Council and not by single Ministers, is known as 'collegiate' (*kollegialisch*), and is a marked feature of Prussia till well into the nineteenth century. The Great Elector considered the Privy Council and himself as the unifying and supreme authority over all affairs of State. The character of the Privy Council had changed from that of an advisory to an executive organ. When he was absent upon campaigns or otherwise its character remained the same although the provincial Statthalter of Brandenburg or some other councillor would conduct its sessions. Some of the chiefs of the various departments were appointed members of the Privy Council so that they brought special knowledge to bear upon the discussions and, further, knew exactly how far their department was called upon to execute the decisions. The Privy Council was also a high court of appeal from the *Kammergericht*: but it is noteworthy as a mark of the time, that in a few years a special division of the Council was appointed to hear appeals. There was a continual process of accumulation of business in the hands of the State and a continual creation of special organs to deal with it.

The whole country was the better brought under the control of the central authority by the institution of the *Statthalter*, a local regent, appointed by the Prince. They were non-natives of their particular province, and, being appointed members of the Privy Council at Berlin, they constituted a bond of union between the centre and the localities, making of the resolutions of the Council a local reality. The *Statthalter* was important till the end of the seventeenth century, when the opposition of the Estates and the provinces to central domination having ceased, they became unnecessary in their crude early form. In their place there later arose administrative councils for the area, manned, of course, by officials appointed by the central authority, developing further into the predecessors of the modern Prussian Provincial government institutions. The officials who administered the affairs of these administrative councils were, in part, not formally schooled, but satisfactory to the central authority on grounds of loyalty, demeanour, family and general intelligence and character, and, in part, men who, to such qualities, added legal diplomas. Few were natives of the district in which they served, for in accordance with the nature of the State of the time not the least important quality of a Civil Servant was his impeccable loyalty to the central authority. The Civil Servant was first the outpost of royal power: other qualities were essential, but only after this.

This twofold aim of centralization and militarization accompanied another which we nowadays describe as paternalism. In the actual experience of the Prussian State, however, it was found easier to realize the aims of the first two, but not so easy to create a Civil Service which should produce good fruits from the third. For centralization

and militarization are inimical to paternalism: the former is only rarely its appropriate tool, while the latter is its competitor and consumes its substance. Until the end of the eighteenth century paternalism continued to be a faithful expression of the State, along with centralization and militarization. But the tendency was for it to lose its value compared with the others, and centralization and militarization became the predominant characteristics of the Prussian Civil Service. Forms predominated over purpose; command over the substance of commands; hierarchy over colleagueship; discipline over free creation; routine over local and personal invention; and at the end of Frederick the Great's reign the charge of 'bureaucracy' begins, not to end even in our own day.

The War Commissariat. We have anticipated the results of development. Let us retrace our steps. The local institutions, called *Amtskammer*, which took over the general administration of the country under the *Statthalters*, and which were entrusted with the government of economic, social and fiscal affairs,[1] were gradually overtopped in importance and range of activities by War Commissariats which spread all over the country. These authorities began in the early part of the seventeenth century as an offspring of the mercenary armies. The Prince needed to maintain some regular control over the mercenary captain, to whom the management of a campaign was a profit-making venture, some assurance as to the numbers, ability, feeding and equipment of the armies, and the protection of the citizens against the excesses of the soldiery. A special official was, therefore, appointed by the Prince, called a War Commissar, for each regiment, and this official administered the oath to the mercenary captain, and supervised the maintenance of the contract, saw to the payment of the subventions, and reported to the Prince. For the whole army, further, a chief War Commissar was appointed for a few months or for a campaign. They were the exclusive intermediaries between the army and all State or Estate authorities.

In the middle of the seventeenth century the armies were nationalized. Prussia created a standing army directly administered by the State; and the officers, captains, and men, equipment, and so on, became socialized. Naturally, the War Commissars became permanent State administrative officials: they had their local areas and central department. The Government became a recruiter, and since money economy was yet in a backward condition, it had to become a barracks and feeding agent. The localities were directly called upon not merely to pay taxes in money, but to supply billets, food for men and horses, stabling, arms and clothes. This led to penetrating interference with the life of the citizens, caused interference with civic administration, with gild and market conditions,

[1] Lotz, op. cit., p. 106.

and not least, with the bane of the seventeenth century, inns and tippling-houses.[1] When natural economy gave way to money economy the War Commissars were brought into direct contact with the taxation system of the country. From 1680 onwards the War Commissars stood in the very front and centre of public administration. They were obliged to take into consideration everything that could increase the capacity of the citizen to pay his contribution towards the maintenance of the army; taxation systems and reforms, the excise which would be increased by greater production, the general police measures which would free the people of material and moral defects, social welfare institutions like the promotion of good agriculture and manufactures. They became tax officials and local police authorities and overcame the independent tax officials of the Estates, so that thence-forward the State predominated in this field through its own officials. The Central Directory of War was created, the *Generalkriegskommissariat*, to exercise control and direction over the local Commissariats—the best-hated branch of administration in the State, best hated, that is, by the Estates and the cities, and Frederick William's testament acknowledged the difficulties of the situation. It was the soul of the new State. As one of the ablest of German administrative historians has said, 'Prussia was then not a land with an army, but an army with a land'.[2] In 1712 the *Generalkriegskommissariat*, which had split off from the Privy Council, was reorganized to cope with its accretion of duties: one of its divisions was devoted to taxes and excise, another to military affairs, and the third to administration and administrative jurisdiction. It was organized as all the Departments were organized, upon a 'collegiate' basis, which is roughly equivalent to the original form of the British 'Boards' of Trade and Excise. It had its independent jurisdiction, that is, its prescribed field of activity without interference by any other authority, and acted with a masterly energy and ruthless decision under clever Presidents against all that was obsolescent. State power and civil equality were its pillars.

Meanwhile, from 1651 onwards the financial and economic divisions of the former local agents of the central authority, the *Amtkammern*, were given an independent status, and connected with a central division of the Privy Council. These local Kammer, and the central authority supervising them, had a field of activity comprising the contemporary equivalents of what is now the work of the British Treasury, Board of Trade, Inland Revenue Office, Ministry of Agriculture and Fisheries and other economic administration scattered through the British Departments. The centralization of these activities and

[1] Cf. Schmoller, *Der Deutschen Beamtenstaat*, p. 299.

[2] Ernst von Meier, *Hannoversche Verfassungs- und Verwaltungsgeschichte*, 1680–1866, Vol. II, p. 409 (1898, 1899).

the creation of a central department came gradually, and was brought to its completion by the wise and energetic work of Von Kuyphausen. In 1689 he caused the creation of the Exchequer (*Hofkammer*) which, after his time, became the General Financial Directory (*Generalfinanz-direktorium*). The national accounts were unified and clarified and a budget of income and expenditure established, financial administration over the whole country was reduced to like terms, and uniform administrative principles were laid down for all parts of the State.

Both the War Commissariats and the Chambers took away from the power of the old claimants—the governing bodies which represented the local and feudal authorities. These authorities had till recently possessed the power to judge the competence of the Chambers wherever they were disputed, but gradually this power of judgement was withdrawn, and all matters relating to the *statum politicum et oeconomicum* [1] were transferred to the Chambers and the Commissariats themselves. Safeguards of independent justice were arranged whereby the local authorities would be represented on the Chambers and Commissariats judging a dispute between themselves and any individual or corporation. Soon these safeguards were withdrawn. *Administrative departments had arrogated to themselves an extensive field of justice.* It was secured that the State departments should decide the limits of sovereignty and private law. By a series of Instructions between 1713 and 1725 Chamber or Administrative justice [2] was set in the ascendant until the reforms of 1808; but the extent to which it is maintained is still a point of distinction between Continental and Anglo-Saxon institutions. Its later development and significance is printed in another chapter.

Absolutism and centralization rendered the development unavoidable, since the challenge to the State came, as yet, less from the individual citizen, than from men and institutions who desired to cripple the growing State, and the Prince had to make sure that in a political struggle in which the State sought to retrieve the domains, alienated rights to land and jurisdiction, and the rights to interest on loans made to the State, the courts which judged the issue should be manned by friends. The old local authorities were further weakened thus: instead of the taxation which they raised among themselves through their own officials, the Commissariat Departments were able to set up new sources of taxation, of which the chief was the Excise Duties—and their administration was entirely in the hands of the new authorities.

Centralization. The centralization of the country proceeded apace. As in contemporary England, there was no local government system in organic connexion with the central authority: none which, made by the central authority or evolved from its own necessities,

[1] Lotz, op. cit., p. 115.

[2] Cf. *Acta Borussica*, III, 682 ff.

had formed an efficient association with the central government. The towns and other great estates ruled themselves. The King's representatives on the domains had lost all power and preserved only their names, like the Lord-Lieutenants of England, and the real administration of the domains was now in the hands of royal officials qualified, by experience or learning, to carry on the management. For many years this lack of systematic local institutions was met by the voluntary association of large estate-owners, who by joining forces were able to carry out matters of uniform administration such as fire-protection, poor relief, credit, dikes, and especially the distribution of the amount of taxation due from them. These voluntary administrators were called *Kreisdirektoren*, and they and their districts became the basis of the Elector's local government arrangements. The establishment of a standing army had led to the appointment of State Commands for these districts, and, naturally, continuous negotiations between these and the *Kreis* authorities took place. It was not long before the work of the Commissars was transferred to *Kreisdirektors*. Instead of being self-elected they now came to be appointed by the Crown, and as the office grew in importance and required technical knowledge they gradually became central professional officers under the direction and pay of the central authority. Upon the request of the directors of the Circles (*Kreis*) the title *Landrat*, formerly the title of an official of the Estates, with a long and an honourable history, was accorded them; and where there had been no Kreisdirektors, *Landräte* were established. These *Landräte* are still represented in Prussia by their lineal descendants of the same name, but their specific position and functions cannot be discussed here. What we have to notice is this, that a local authority was created which represented at the same time both the central authority and the local interests; that that authority had come into being out of military necessities and for more than another century the military spirit pervaded its administrative activity; that activity naturally became extended over a very large number of economic and social activities; but the size of the area administered by a *Landrat* was in Prussia too big to allow of minute government and it lacked judicial power: and it was a rural not an urban institution.

The towns were brought under the supervision of the central authority by the institution, in 1680 and following years, of Tax Commissioners to whom the municipal excise officials were obliged to account. At first they were travelling commissioners, making their circuits twice a year.[1] Soon their tasks were increased, for, as tax officials, the central authority required them to undertake various detective activities, for example, into the rate of payment for entry

[1] Cf. Schmoller, *Preuszische Verfassungs-Verwaltungs und Finanzgeschichte* (1921), p. 151, 2.

into citizenship, or the fees asked for admission into gilds. With the assistance of municipal magistrates they became courts of justice in cases of tax frauds and insults to tax officials. They were made the inspectors of weights and measures; new taxes upon bakers and slaughterers were put under their management, and little by little they came to supervise the whole field of municipal administration, and to control the trades—gilds, building and brewing. 'By 1722 the Tax Commissioner had practically become the guardian of the town, which lost all independence.' [1] He had under his control a host of officials: factory inspectors, building inspectors, municipal foresters, medical men, and lesser officials like police and bailiffs, statisticians and clerks. Tax collection ceased to be his primary business: the control and supervision of the life of the municipality in the name and the interests and under the direction of the central authority became his vocation. He was the clearest symbol, as he was the most active agent, of the police-state, the bureaucratic state on its paternalistic side. He combated local simony and nepotism. He was not, however, a wheel which turned independently of the other cogs set in movement by the energetic Hohenzollerns—he was a member of the War Commissariats, where he exercised weighty authority. He had no judicial authority, but the Commissariats had, and they judged the cases he brought before them. The Tax Commissioner's profession was the training ground for the best Prussian officials of the eighteenth century,[2] and they brought to their central departmental duties a fund of experience which explains why the Prussian State, incapable constitutionally of being reformed from outside or 'below', could at decisive times be reformed from within or 'above'.

There was by now, in the first quarter of the eighteenth century, a Civil Service large for its time: Posts, nationalized in 1650, Taxes, Customs, Forests, Salts and Mines administration, the Schools and the Church, in country and town, demanded a large number of officials, capable officials, most of whom were recruited from subaltern army officers who had finished their service. The wakeful vigilance and grim earnestness which enabled the Hohenzollerns effectively to demand the efficiency and accountability of their Presidents, Ministers and Councillors was continued in the relations between these and their subordinates in the early days, at least, of these institutions, and with variations from Chief to Chief.

Under the Great Elector, then, there had been a mighty development, which did not cease when Frederick I ascended the throne. The impetus given to the development of the State and the organization created and the men appointed continued to transmit their effects through and beyond the reign of this King, who, administratively, was the weakest of the four rulers in whose time modern Prussia was

[1] Lotz, op. cit., p. 121.

[2] Schmoller, *Deutsche Beamtenstaat*, p. 300.

founded. When that impulse might have lost its energy it was reinforced by Frederick William I, whose reign of twenty-seven years was for administrative creativeness only equalled in Prussian history later, by the Stein-Hardenberg group of reformers. Greater than inventiveness in human affairs is the power to cause invention. It was such intensity of life that Frederick William brought to the service of the State.

Energy and System. So far only the pioneer work had been done, great as that was. Men had been chosen for the State services of great capacity, occasionally of extraordinary talent, the field of State activity had been plotted out on an extensive scale, the enemies of the State suppressed, and a measure of competence and honesty introduced into the Civil Service. The organization though so far approaching systematic form was still loose and tentative, the authorities confused and overlapping. The new ruler added system, formulated the rules of recruitment, for higher officials, purged (by no means entirely) the Service of the dishonest, and infused it with a fresh energy.

The quality of this energy is more important than the institutions which were created, but we cannot omit the institutions, because they work upon mind and energy, now improving, now spoiling, what springs from the inward source. Schmoller best describes Frederick William's character, and it was this which, to the extent of the possible, recreated that of his officials. He entered upon his work with 'modest, fatherly economy, with Protestant conscientious morality, with sober rationalistic consideration, but also with the shrewd intensity and force of an unbendable will'.[1] His

'terrible hardness was ennobled by a faithfulness to duty almost never then seen upon a royal throne,[2] and the moral earnestness which desired nothing for itself but everything for the State. Without such nobility, such moral weight and force, the sense of State would nowhere have been triumphant. Nowhere would the dissipated sovereign rights have been won back. Since the day of the Saxon and Frankish Emperors no such princely rule had been seen in Germany. For the first time in centuries the German again realized that something like the *tribunitia potestas* of the Romans, belonged to the essence of the State, and that the Crown was the natural residence of this authority; that it was, with this authority, the best protector of the lower classes against the egoism of the higher, as well as the best guardian of national honour and independence against external foes.

'I find,' says Carlyle, 'except Samuel Johnson, no man of equal veracity with Friedrich Wilhelm in that epoch.' And again, he says: 'One Leipzig Professor, Saxon, not Prussian by nation or interest, recognizes in Friedrich Wilhelm "*den grossen Wirth*" (the great manager, husbandry-man, or landlord) of the epoch,' or, as we should say to-day, the great economist or administrator. 'Friedrich Wilhelm's History is one of *Economics*.'

[1] Schmoller, *Deutsche Beamtenstaat*, p. 287.

[2] The quotations which follow are from Carlyle's *Frederick the Great*, Books IV to X.

The institutions energized by this intense spirit were ingeniously planned. In all the central departments the 'collegiate' principle was thoroughly carried through, in order to avoid the predominance of any one man and to secure the benefits of collective wisdom and continuity of policy. Collective responsibility was enjoined. The Councils were responsible, especially for accounts and for the probity and competence of their subaltern officials. The Councillors were expected to create the means of narrowly watching all those at work in their department, and they were to make use of 'spies' to inform themselves. Yet they were to examine with care the reports made by the spies lest the reports did an injustice to their subjects. Even the King himself had spies all over the country to report upon the conduct of Ministers and officials.[1]

Various Instructions settled exactly the hours of work, procedure, official secrecy. Employment outside the official Service was prohibited, the acceptance of presents was prohibited, excise officials were forbidden to buy confiscated goods, and from those who handled money a guarantee was required. The officials who came into direct contact with the public were ordered to be polite and the insulting of merchants was punished with a fine for the first offence, and with imprisonment for the second. The Tax Commissioners were ordered to keep personal records of the local officials. Residence in the neighbourhood of the work was exacted, and the conditions of leave were rigidly regulated. For breaches of the regulations there was a series of heavy fines, which were imposed. A Spartan quality was introduced into the Service.[2] Perfect accounts were expected and expenditure beyond the budget was charged against the official. The King now undertook the examination of estimates, and each was obliged to receive his assent. Along with these sources of information about the nature of his State, the ruler had regular reports at various times of the year from the various central and provincial authorities. The royal example operated downwards through all grades of the Service, and the spirit of strict subordination, the forcible exaction of the last ounce of duty from those who were obliged to render it, became part and parcel of every member of the administration. Direct explosions of the royal wrath were feared, and there yawned always the gulf of delation by colleague-spies. The King's example compelled imitation even to the farthest corner of the kingdom.[3]

[1] E.g. *Acta Borussica*, III, 285, 'A secret instruction to Minister von Katsch.' 'If here and there intrigues should occur among my Ministers, he shall at once inform me. Von Katsch must always take every trouble that they do their duty, and stop their intrigues so that my service shall not suffer thereby. If, however, anything occurs to contravene my instruction, and against my interests, Von Katsch must report to me at once, and in so far as he does not, he is responsible to me for it. Von Katsch shall be lenient to none, whoever it is, even my own brother, etc.'

[2] Cf. Isaacsohn, op. cit., III, 194 ff.

[3] Cf. Isaacsohn, on fees, bribes, charges, and complaints of rudeness, etc., III, 162 ff.

It would be a mistake, however, to imagine that the character of the Civil Service of the time could be compared at all with the professional decorum of our own day.

Examinations. In this reign the first formal rules of recruitment were established; and, fundamentally, they have ruled the German State ever since.[1] Already in 1700 written and oral examinations had been prescribed for military judges and Judicial Councillors. By the Judicial Order of June, 1713, it was laid down that no subordinate Judge was to be appointed and no advocate was to practise without passing the examination prescribed by the State. If there were several competitors for posts the best candidates were to be accepted in order of merit. Soon after this the *Protonotarien*, the highest clerical officers and the secretaries of the Law Courts, were required to pass a written examination before appointment. All this, of course, presupposed a thorough legal training at a University, and in 1723, such a training was expressly required, and at a native University, the University of Halle, about which we shall have something further to say a little later. Aspirants to the Service could be allowed to participate in the procedure of the Courts, but without a vote, before taking their State examination. Thus began the system still adhered to in Germany of the *Gerichtsreferendar*: the aspirant to the Judicial Service, who takes his University examination, and is known as a Referendar, while he undergoes a period of preparatory service, after which he takes the final State examination to become an Assessor, the first rung of the Judicial Service. In 1737, a minimum of legal knowledge was prescribed for all other officials, in whatever departments or institutions, who participated in the administration of justice. This affected the relationship between noble and citizen, to the general advantage of the latter, since even those who took part in the administration of justice in virtue of feudal survivals were now obliged to acquire their university diplomas.

The rules of recruitment for the higher administrative service were not prescribed until later. And it should be specially noticed that these differed materially from those applicable to the judicial service. Experience was at first considered a better preparation than any formal training that could be invented, for general administrative work. Apparently, this, which occupied itself directly with promoting the economic welfare of the country, was the King's favourite branch, for upon being asked by the General Directory in 1723 whether a place could not be found for the son of a deceased chancellor he answered: 'Examine him to see whether he has sense and a good head; if he has, let him be employed in the Kurmark War-and-Domain Chamber; if, however, he is a fat-headed devil make him

[1] Cf. *Acta Borussica*, I, *passim*.

a member of the Supreme Court of Cleves, he's good enough for that.' [1] Yet considerations of efficiency soon found their expression in a genuine though rough-and-ready procedure. The Instruction (20 December 1727) establishing the *Generaldirektorium* contained the general statement of qualifications: the Presidents of the Commissariats and Chambers should have the same qualities as members of the General Directory:

'clever men as could be found anywhere, Evangelical, Reformist or Lutheran by religion, faithful and honest, with intelligent vision, possessing sound information about commerce, manufactures, and other cognate subjects, but also able with the pen: above all, they must be native subjects, but a foreigner of extraordinary ability can be suggested; they must be persons who are capable of anything for which one wishes to use them.'

The Councillors in the Provincial Commissariats should be 'good capable people, with a sound common sense and acquainted from youth with commerce, manufactures, excise and other affairs arising in the Commissariat Department'. In the Provincial Chambers 'good administrators must be employed, who were formerly administrators and officials, and themselves ran estates, and are also people of long experience, who understand accounts and are vigilant and strong'.[2] A candidate for an administrative situation, let us say in the various Administrative Chambers or Commissariats, a Tax Official, or one who sought employment in the Forestry or Postal Department, would be required to show evidence of ability by the written answers to statistical problems, the establishment of a Budget, or survey of an estate, and the oral discussion of definite themes with the head of the Department or his representative. It was expected that the candidates should have taken courses at Halle, Frankfurt or Königsberg in Cameralism, that is, in administrative science, agriculture and forestry. The university diploma was a pre-requisite, ordinarily, to office. Young men were brought into the Service after such a preparation and were then employed, without pay, in the Departments, so that they might acquire practical experience of administration before they were given a permanent situation.

Here, in these University candidates, we see the lineal ancestors of the modern *Regierungsreferendar*: the Government or Administrative Aspirant, then called *Auskultator*. A Cabinet rescript of 1743 [3] prescribed that (in the Kurmark) one year's preparatory occupation in the Chamber should be followed by an examination in the presence of all the chief Ministers of the General Directory and the chief of the Chamber. In 1748 the qualities and studies of the candi-

[1] Ernst von Meier, *Französische Einflusse auf die Staats- und Rechtsentwickelung Preussens im* XIX, Jahrhundert, II, 65 (1907).

[2] Ernst von Meier, *Die Reform der Verwaltungsorganisation unter Stein und Hardenberg*, Ed. 1912, p. 27.

[3] *Acta Borussica*, VI, 2, p. 670.

dates for government service as *Auskultator* were laid down in an Instruction.

'They must have occupied for at least one year such a position as would have given them the opportunity to obtain a knowledge of agriculture, cattle breeding, brewing and brandy manufacture, as well as trading accounts and extracts, as well as the surveys and valuations; during the winter they should learn something of administrative policy in the neighbouring towns, and finally, they should make a record of what they thus learnt.'

The State did not leave to chance the creation of the requisite faculties in the Universities, but in 1727, Frederick William established a Professorship of Cameralism at Halle and Frankfurt to teach 'the principles of agriculture and police, also the institution of surveys of offices and estates, and also the efficient administration and government of towns'.

Neither the King's part nor intentions were yet exhausted. He required qualities in addition to those shown by the procedure of recruitment thus far described: an engaging nature, adaptability and independence of character, 'lively spirit and an intelligent brain'.[1] Those who had passed the preliminary tests but lacked these further personal qualities were given subordinate positions at the most, and many who possessed these qualities but had not arrived before the King's notice by the normal academic road received high places of trust.

Although we have at this point gone beyond the reforms which can be ascribed to Frederick William, it is convenient not to break off here, but to pursue this history of recruitment to the final point it reached before the storm of the French Revolution and the period of the great reformer at the turn of the eighteenth century. Theory marched with practice, and the specifically German contribution to economic and political science of the eighteenth century occupied itself continually with the problems of the formation of a satisfactory Civil Service.[2] Gasser, first professor of economics at Halle, for example, shows clearly how insistent were the royal desires to change the basis of admission into the Service from legal training to a more general education. The lawyer is too involved in pedantry and tricks.[3] Zincke[4] pointed out the need for a broad education in all the sciences appropriate to the State's task, namely, 'to improve

[1] Cf. Isaacsohn, III, 197.

[2] G. Marchet, '*Studien uber die Entwickelung der Verwaltungslehre in Deutschland von der Zweiten Halfte des* 17 *bis Zum Ende des* 18 *Jahrhunderts*', 1885; and Small, *The Cameralists*.

[3] Small, op. cit., p. 210. Gasser said: 'His Majesty the King of Prussia resolved to establish *Professores Oeconomicae* at the universities of Halle and Frankfurt, who should teach the students the principles of agriculture, *policy*, and also the establishment of budgets of offices and estates, and, further, the proper administration and government of towns.'

[4] Op. cit., p. 228.

and perfect all that constitutes the temporal weal of its members'. Justi,[1] himself, in the Prussian Service of Mines for some time, emphasizes the importance of Cameralia or *Staatswirtschaft*, that is, the whole complex of administrative-cum-economic science taught at Halle University. 'There are very few positions', he says, 'of responsibility in the State in which expertness in the economic and the Cameral sciences would not be the chief matter, if the duties of the position were fulfilled and good service to the State performed.' Moreover, the State may be compared to a machine; hence all its parts, that is the officials, must be appropriately recruited and managed to its purpose.[2]

The examination system was rounded off principally by rules laid down in 1748 and 1770. A candidate for the higher government service must have had a good academic record. Upon application to the government he was first given a written examination by a particular Department, and then followed an oral examination before the Chamber Examination Commission. The one year's experience in a local department in accordance with the rules we previously described was required in addition to the academic preparation upon which the examination was based. The Commission reported to the Department, the latter to the General Directory. The second and final examination was taken with permission of the Department, no period between the first and second being prescribed. It consisted of a written part, in which there were papers in jurisprudence and in administrative science (*polizei*) and in the survey and valuation of an estate, and an oral part, which could ramify over all branches of finance, natural law and other subjects contiguous to the science of public finance. Some of the records relating to these oral examinations are extant and show with what comprehension and thoroughness the examiners executed their work, if not their victims.[3]

A Profession. What, now, we may ask, was the essence of this development? The administration of the State had been professionalized, that is to say, it now depended upon a body of men permanently employed upon special work, their activities being uniquely at the service of the State, and being purposively regulated and disciplined to accomplish its specific ends. A system of educational preparation had been established the like of which no other State demanded until the lapse of more than another century, and in its composition there was secreted the most appropriate training imaginable for the eighteenth-century State, by no means without lessons for our own day: for it required a knowledge of real as well as of written things, and both kinds of knowledge appertained to the

[1] Small, p. 294 ff.
[2] *Gesammelte Politische und Finanzschriften, etc.*, 1761, I, 8.
[3] Cf. E. von Meier, *Die Reform der Verwaltungsorganisation*, pp. 30–4.

actual institutions by which men earn their living and pursue their social destiny. A resolute, impartial, energetic and honest spirit had been breathed into the service, and it became, side by side with the military career, the vocation *par excellence* of the most ambitious young men. Henceforward, the Civil Service became a career to which many families, generation after generation, contributed their talent, and it was a deliberate purpose of Frederick the Great's to draw into the Civil Service successive generations of the same family to create the proper mentality of servants of the State. The noble received a certain preference, but less under Frederick William than under Frederick the Great, and even then only if the minimum regulations had been met.[1]

The State had been almost altogether centralized, it performed an enormous range of duties. The two great organizations administering the country were the Commissariats and the Chambers. In 1709 these authorities had been ordered to confer in order to avoid wasteful competition, but, far from diminishing, friction increased, since the advent of Frederick William brought with it greater pressure upon the authorities. Disputes were decided by the King, but this was merely a solution because there was no better. Attempts made in 1722 to set up *principia regulativa* failed. After careful consideration, the argument of which is to be found in Frederick William's own memorandum and Project,[2] the two great central organizations corresponding to the provincial Commissariats and Chambers, namely, the *Generalkommissariat* and the *Generalfinanzdirektorium* were dissolved, and a single authority took their place. This authority was called the General-Supreme-Finance-War-and-Domains-Directory ;[3] called for short, popularly and officially, the General Directory. Under this the provincial authorities, Chambers-Commissariats, were amalgamated. This accomplished a centralization and uniformity of administration unlike any which had hitherto existed. It was in this organization controlled locally that the principles of 'collegiate' and collective responsibility operated. The King was its President, and the Privy Council, or secret State council which had served the Great Elector, though not formally or necessarily connected with the General Directory, yet contained among its members those who constituted the Directory. This consisted of five vice-presidents, four of whom were responsible for the conduct of great departments (each concerned with a special area of the territory as well as some special services which were common to the whole country, e.g., Posts, Industry and Trade, etc.). The fifth vice-president took charge of matters of

[1] E. von Meier, *Französische Einflüsse*, II, 58.

[2] See *Acta Borussica*, III, 537 et seq.

[3] *General Ober Finanz Kriegs und Domänendirektorium* (cf. E. von Meier, *Die Reform der Verwaltungsorganisation*, p. 106). Readers who must rely on English sources may read an account in Seeley's *Life and Times of Stein*.

administrative jurisdiction arising in all departments, and was known as the General Fiscal, an authority of a nature most foreign to Anglo-Saxon institutions, and this gradually drew away from the policy-making departments, a special Commission took over a large amount of its work, and the connexion between the General Fiscal and the Directory became very loose. Also the Privy Council gradually came to interest itself only in matters of Justice and Ecclesiastical affairs. Council and Directory went each its own way independent of the other.

Any central survey of policy was left to the Cabinet, the King's immediate entourage of trusted advisers. Under Frederick William it became attenuated to the point of non-existence, but under his successors it resumed its substance and energy and practically converted the Departments of the Council and Directory into its subordinates. The Political Testaments of Frederick the Great, as well as his actual manner of government, show clearly how the reins were all brought into the Cabinet and thence to the Crown.[1]

'A well-conducted Government must have system as well-knit as any system of philosophy; all measures taken must be well-considered, and finances, policy and the army must move together towards the same purpose which is the strengthening of the State and of its power. Now, a system cannot emanate except from one mind; therefore it must issue from that of the King. . . . More vividly affected by what he thinks, than by the thoughts of others, he will follow his plans with the fire necessary to make them succeed; and his pride which attracts his interest to the work will become useful to the country. . . . Sovereigns of the first kind (who themselves rule) are like the soul of their State; the weight of their Government rests on them alone, like the world on Atlas: they regulate both foreign and domestic matters; they fill at once the positions of first magistrates of justice, General of the armies, chief treasurers. They have, like God (who uses a mind superior to that of men in order to operate upon their wills), penetrating and industrious minds, to execute their plans and to fulfil in detail that which they have projected in the large; their ministers are properly instruments in the hands of a wise and clever master.'[2]

For nothing had Frederick the Great more contempt than the French practice of a weak King and mutually independent and hostile central departments.[3]

Militarization. This might have proved for a century or more to be an efficient system of government. But already there were two features that might easily become defects: the Service was militarized, and one personality, the King's, overshadowed all the rest. The Service was militarized by Draconic discipline and the rigidity of its classes, shown in the perennial disputes regarding precedence and uniform (both means of exacting men's emulation and

[1] *Die politischen Testamente Friedrich's des Grossen* (Berlin 1920, Edn. Professor Gustav Berthold Volz), pp. 37, 77, etc.
[2] *The Anti-Machiavel*, Edn. Hague, 1741 (Jean van Diven), p. 276.
[3] Op. cit., p. 37.

energy as powerful as money payments). The aggressive and peremptory spirit of the Commissariats had triumphed over that of the Chambers upon the amalgamation of the authorities.[1] The subaltern ranks of the Service were intentionally filled with those who had held subordinate posts in the army. There was required of entrants to the subaltern Service a certain efficiency in reading, writing, and arithmetic. The military entrants were given special access to the taxes administration. From these officials the King required 'enthusiasm, regularity and punctuality, and unconditional obedience to directions and official regulations'.[2] The frequency of war caused occasional surpluses of men in the intervals of peace, and the jobs in the local services of the central authority were almost entirely made over to the military candidates. Thus, men of a certain age, good tools for a determined master, but of rough edge for their immediate neighbours, and without any elevation of mind, held the great majority of executive posts. Nor was this all. This Service was on the whole subordinate to the first purpose of the State - the extension of its dominions. Infused with military spirit and dedicated to military ends, it was quite natural that under Frederick William and Frederick the Great its paramount purpose should spoil the instrument for any other objects, perhaps more desired by the population; the true interests of which were welfare rather than international glory.

One personality overshadowed and drove all the rest! The Prussian State before 1740 had been compared to a great school and the King to a Headmaster.[3] What should happen when the task grew too big, or when external pressure took the mind of the genius away from domestic affairs? It was inevitable, if that should happen, and civilization produced these conditions, that the wheels would continue to turn for a limited time, and then require adjustment, not to another great man and many 'average' subordinates, but to 'average' men only.

Without inquiring into the technical details of administrative evolution under Frederick the Great, we may at once estimate the main results of the reign upon the Civil Service. Militarization increased; centralization and extent of territory increased; paternalism increased, for this was the *apogée* of enlightened despotism; the Departments with their 'collegiate' constitutions were not roused, as before, to rapid and certain resolutions by a King, for the Great Frederick was too often engaged with foreign enemies and friends.[4]

Friction in Council. Therein lay a natural defect of the consti-

[1] E. v. Meier, *Französische Einflusse*, II, 25. [2] Lotz, op. cit., p. 159.
[3] Schmoller, in *Preussische Jahrbucher*, Vol. 26, p. 552.
[4] Cf. the fine survey by C. Twesten, *Der Preussische Beamtenstaat* (*Preussische Jahrbucher*, Vol. 18, 1866).

tutional environment in which the Civil Service was being created, a defect which has not yet been entirely eradicated from the German political system. The men who rose to be heads of Departments and one day awoke to find themselves members of the supreme central Councils or in the entourage of the King, could have had no other connexion with their colleagues, as a rule, than one mainly of personal competition. They came from different localities, were taught, perhaps, at Universities far removed in traditions and intellectual value, they obtained their experience in special Departments under superiors of varied mind and temper. There was no single external bond, but only that vague one which is liable to such varied interpretations—the service of the King. It is not surprising that the Councillors differed in their views of what best would serve the King; and such a difference soon awakens a desire to dominate in its interests. Where force is impossible and differences abound, the struggle for domination is expressed in intrigues. As we have seen, Frederick William had set himself the task of reducing this Departmental friction to a minimum by the establishment of the General Directory, but this only brought men together, it did not make of them a society. German administrative history down to our own day is full of camarillas, cabinets, cabals and cliques. Where democracy rules, the differences of temperament and character express themselves in public, and a publicly elected cabinet or camarilla is strictly constitutional; spite becomes a party virtue, and, on the grand scale, meanness is transformed into 'legitimate expectation'. At least each clique embraces millions of people, and the voice of the clique cannot then be differentiated from the voice of God. However, the tenets of the party strengthen the elements of public policy expressed in personal differences and reduce private asperities. The lack of publicity and the personal power of the King encouraged the growth of intrigue.[1]

The Polizei-Staat. By the time of the French Revolution this caused the failure of the 'collegiate' or Board system of administering Departments. What was radically at fault with the apparatus as a form was its dependence upon an impulse from above and within, and upon its own strength and knowledge. It would have been extraordinary for kings who called themselves the 'first servant of the State' to serve on any other terms but their own, or to admit the superiority of anybody else's wisdom.[2] They could not admit

[1] England had a similar experience in the first century of the evolution of the Cabinet system.

[2] Cf. *Political Testament of* 1752. 'The first duty of a citizen is to serve his country. This duty I have attempted to carry out at every stage of my life. A man who, like myself, is entrusted with the honour of the highest office, has sufficient opportunities and possibilities of making himself useful to his fellow-citizens. The love which I bear them gives me reason to desire to render them a service even after my death. I am sufficiently conceited to believe that the conduct of my life might serve as a rule for those who will fill my place.'

either the wisdom or the right of the people to determine the main lines of policy. Political theory as yet opposed such a field of liberty, and the administrative science of Cameralism did not provide for the participation of the administered. All roads led to what is now called the *Polizei-Staat*. We have already explained that *Polizei* in seventeenth- and eighteenth-century administrative and political science did not mean the mere maintenance of the peace. Its connexion with constabulary was inappreciable. It comprised almost all that we know to-day as the administration of economic and social institutions. Mayer, the German constitutional lawyer, defines it shortly: 'Police: that which gives the whole its distinctive mark, and becomes a comprehensive and systematic working-up of the human material available in order to lead it towards a great goal.' [1] Its outlines were strict obedience of the subjects to the King who was the first servant of the State; the legal omnipotence of the royal will; a Civil Service which was the expression of this will; and in practice the enormous range of the State's power. But its full terms are to be discovered in the writings of the Cameralists, whose theories we have outlined in the chapter on 'The Conditions of State Activity', and of Christian Wolff, the 'official political philosopher' of Frederick the Great.

Towards the time of the French Revolution the system no longer operated with the effectiveness of a generation earlier. Cameralism and mercantilism—it is possible even to talk of State Socialism [2]—had led it into a range of activities which could be successful only by decentralization and popular co-operation; the military spirit had overcome that of social service, and strictly disciplined hierarchies ramifying through a large country were mentally too inflexible to invent the necessary devices to vanquish routine. The Service was obedient, but lacked that personal interest in the result which is the salt of industry. Meier thinks that the Service was suffering from long over-discipline between 1723 and 1786. The single-headed genius had departed and multiple-headed Demos was not yet called upon to propel the machine or renew its defective parts. While Frederick William had been the personal president of the General Directory, Frederick the Great and his Cabinet now directed activities by memoranda, and the Central Departments increased in number. When Frederick the Great died the Directory had lost its cohesion and the Cabinet its driving force.

'But this police-power', says one of the greatest authorities, 'operated grimly and unmercifully; with an impulse of eudamonistic and social welfare

[1] Otto von Mayer, *Deutsches Verwaltungsrecht*, 3rd Edn. (1924), Vol. 1, p. 38.
[2] Schmoller, *Preussische Verfassung*, etc., *Geschichte*, p. 169. Cf. also Wolzendorff, *Der Moderne Polizeigedanke*, Part I.

it threatened to annihilate the definite private sphere of individual freedom. It threatened, as Tocqueville said, to change society into a prison or a barracks. In an Administrative Order of Baden in 1766 the following appeared: "Our Royal Administrative Council is the natural guardian of our subjects. It is its duty to lead our subjects from error and show them the right path; to teach them even against their will how to manage their own domestic affairs." Were this standpoint accepted, then ultimately one would be obliged to place a State official by the side of each citizen for life.'

It was Frederick the Great's merit to have used the Civil Service for ends which he considered to be of worth, it was his defect that he did not reserve energy to overcome its depreciation or effect its improvement.[1] His successors were unable to assimilate their gains in territory—between 1786–1806 the population was doubled, and the area nearly doubled. At Jena the old Prussia nearly died of indigestion. For its unrejuvenated system had been called upon to consume a diet as enormous as it was unusual: the economic and political ideas of a new age.

The Revolutionary Age. There now took concrete and institutional form those conceptions of social relationships and government which were proclaimed by the pioneers of the French Revolution. The Physiocrats and Adam Smith powerfully challenged the economic assumptions of Colbertism and Cameralism, and they could be no less explosive of the political institutions which embodied them. Rousseau and the Jacobins atomized the State before they reconstructed it, and made its integrated operation depend in the first place upon the interests and the will of the atoms. In Kant and his colleague Kraus,[2] at the University of Königsberg, a stimulus was given to political and economic individualism and the reign of law in which each individual should be regarded as an end and not as a means. The enlightened despotism of Frederick the Great and Christian Wolff were discredited by these new prophets, and those who sat at their feet in 1780 and the following decade were the foremost officials towards 1800. If the startling ideas and events of these years made immediately no great inroads upon the institutions, they did upon the mind, of Germany. They did, in fact, cause a theoretic challenge rather than practical reform, at least until many years had elapsed; and where reform was carried out, it was not a product of the population or of those who spoke for it, but, in the words of the great reformer, Hardenberg, of a 'Revolution from above'. The influences of *laissez-faire* and democratic theory were effective in Germany only upon a portion of the bureaucracy, and, further, upon the philosophers. It is fair to say that philosophy was affected more

[1] Schmoller, *Der Preussische Beamtenstand unter Frederick William I*, in *Preussische Jahrbücher*, Vol. 26, p. 553.

[2] See Ch. J. Kraus, *Staatswirtschaft*, 5 vols., Konigsberg, 1808–11.

than the men with practical power. If in the first and second decades of the nineteenth century the *Wealth of Nations* was described by an influential professor as a revelation only equalled by the New Testament, and the ability and character of men were judged by their attitude to *Smithianismus*, we can only remark that, like the Gospel in the world at large, this, too, remained for the most part but a book with unbroken seals.[1] The doctrines and the events stormed wellnigh in vain upon the Frederickian State which one of its rulers had called a *rocher de bronze*. It is significant that no real reform was attempted until the disaster of Tilsit in 1807; and the reforms projected in Stein's great year of office were only partially carried out. The fact was that monarchical ideas were strong because the monarchy had not been inefficient, and it had deadened the people with military discipline and conserved the economic and social privileges of a landed nobility.[2] A constitutional monarchy was the furthest point to which even Stein, a political regenerator of the first rank, was prepared to go.

We are not here concerned with the various reforms produced between the Peace of Tilsit in 1807 and the downfall of Napoleon in 1815. The changes in local government will be indicated in a volume devoted thereto, and the central administrative reforms will be outlined later. For, from now onwards, the Frederickian system came under continual criticism, and we desire rather to discover the nature of that system from the criticism of it, than the respects in which it was altered. Its first great critic as well as its foremost regenerator was Baron von Stein.[3]

The centralized, military and police-state held together until Napoleon smashed it. Only its desperate need caused King Frederick William III to invest with supreme authority the only man who was able to conceive, if not realize, the essential reforms. It was not Stein alone who conceived the reforms, settled their principles or worked out their details. He was encouraged and helped by colleagues and subordinates of equal genius in their own spheres—von Schön, Hardenberg, Scharnhorst, Gneisenau, Vincke, and the two brothers Schrötter and others. But he was possessed by the

[1] Cf. *Diary of Vincke*, August, 1796 (cited Meier, *Französische Einflüsse*, II, 172): 'I devoted this morning to reading the divine Smith, and I have made it a rule for myself to begin my day's work by reading every morning a chapter of Smith.' . . . Yet in 1808 there is a quite new note: 'Whoever allows himself to be killed for the beautiful theoretical phrase that the State ought to let everything go its own way, may find a lesson upon consideration of the agricultural conditions of *Eichsfeld*'

[2] Gooch's *Germany and the French Revolution* amply shows this. Those who have worked on the first-hand materials of Gooch's book cannot fail to bear tribute to its conscientious and able scholarship.

[3] Regarding Stein these works are valuable: Lehmann, *Freiherr von Stein*, 3 vols., 1902; Pertz's biography, to which Seeley was much indebted; Seeley, *Life and Times of Stein*, 4 vols., London, 1879; Botzenhart, *Die Staats-und Reformideen des Freiherrn von Stein*, 1927; Ernst von Meier's books already mentioned.

passionate desire for his end, the capacity for sustained endeavour, and the flaming but controllable impatience, in the degree of intensity which convinces the doubtful and overcomes the obdurate. This spirit, aflame and invincible, was conducted by a mind and character formed and tempered by affairs. Experience as a Prussian official for nearly a quarter of a century had taught him the nature of the Prussian bureaucracy; and to him, that nature was synonymous with ossified weakness.

By 1806 Stein was responsible for indirect taxation, State monetary administration and commerce and industry. He reformed the Salt Administration, established a State Office of Statistics, caused a far-reaching reform of taxation and inland tariffs. Stein laboured amid colleagues who were driving Prussia, by their foreign policy, towards the terrible defeat at Jena. On 27 April 1806, he wrote the first of his famous memoranda, the 'Memorandum on the deficiencies in the organization of the Cabinet and the necessity of constituting a Ministerial Conference'.[1] It was the indictment of a system which could live and work beneficially where a king like Frederick William I was at its head; and the indictment formed the theoretical spearhead of an attack by Stein and his friends upon those who were taking Prussia to her doom. From Nassau, his home, Stein issued a second memorandum upon administration and policy: the Nassau Memorandum, 'On the efficient Constitution of the Central and Provincial Finance and Police (Administrative) Authorities in the Prussian Monarchy'.[2] In August, 1807, the King found that Prussia in its deep distress could not do without Stein, and he was called back to what was the virtual Regency: for his rivals were now scattered as he had demanded before his dismissal. Stein was destined to hold this position for fourteen months only, as Napoleon caused his dismissal in November, 1808. In that fourteen months Stein and his friends planned and partly carried through reforms which were decades overdue, and like all real reformers Stein was fiercely hated by the inefficients, the protégés, the possessors of threatened class and financial privileges, and all those whose ease was disturbed by his unflagging vigour.

Stein's criticisms were directed against both the form and the spirit of the administration. He looked to reforms in the direction of decentralization and popular consultation, and a rearrangement of central machinery. As regards the latter he suggested, in order to overcome the growing gulf between the special departments and the lack of unified direction, that in place of the Cabinet (which

[1] 'Darstellung der fehlerhaften Organisation des Kabinets und der Notwendigkeit der Bildung einer Ministerial-konferenz.'

[2] 'Über die Zweckmässige Bildung der Obersten und der Provinzial Finanz und Polizeibehörden in der preussischen Monarchie.'

though atrophied allowed of illicit influence upon the Crown) there should be a Council of Heads of Departments who would be relieved of concern for details, and direct and supervise the execution of the general policy of the country only. In this system the King was to receive advice only from these Ministers, and to command through them only. This would limit personal government and, at least, weaken the influence of territorial differences which had hitherto been emphasized owing to the division of departments upon a provincial basis. A single Treasury was to take the place of the numerous Treasuries. Over and above the suggested Ministry there should be a Council of State (*Staatsrat*) to exercise an even more general and common directive influence upon the various departments of government: to give advice on new legislation, to discuss questions affecting all or many departments. It was to be composed of the Princes, Ministers, high officials and others appointed by the King. This Council, whose uses seem to the critic to be an unnecessary addition to the Ministry, never came into existence. We have already used the term 'Minister'. It was Stein's project to abolish the 'Board' or 'Collegiate' system, and to have a single head for each department. These heads in Council, under the permanent Presidency of the King, would have had many points of resemblance to the early Cabinet system in England, but since Frederick William III preferred one Minister to act as intermediary between him and the others, a Cabinet system could hardly be said to have come into existence: instead, one Minister became predominant and this gave rise to the modern German Chancellorship and Prussian Minister-Presidency which still strongly retain and reveal their embryological features.[1]

The Provincial authorities were to be reorganized so that each branch thereof corresponded in extent of administration with a special central department; and all affairs, it was suggested, which could be left to the independent local execution by these provincial authorities ought to be. A large reorganization of the local agencies of the central authority should then follow.

It is at this point that Stein utters those opinions about Prussian administration which most concern us.[2]

'The provincial departments which are constituted of paid officials are easily and usually pervaded by a servile spirit, a life in forms and routine, ignorance of the district administered, an indifference to and often a mocking scorn of it, a fear of alterations and novelties, which cause increased work, overloading the better officials and escaped by the inferior. When the owners of property are excluded from any participation in the provincial administration, that band which binds them to their Fatherland remains unused; the knowledge which he acquires by his connexions with his estates and fellow-citizens is sterile; his desires for improvements which he sees are necessary for the mitigation of causes

[1] Cf. Chap. XXV *supra*.

[2] From the Nassau Memorandum.

which oppress him, become fainter or are suppressed, and his desire and energies which he would gladly dedicate to the State under certain conditions are spent in pleasures of all kinds or dissipated in laziness. It is really stupid to see how the owner of an estate or any other property of great value is robbed of any participation in the affairs of his province which, however, is exercised (but unused) by a stranger, one who does not know the country, an official who has nothing in common with it. As the property-owner is removed from any co-operation in government, the social spirit and loyalty to the monarch are killed, the antipathy to the government is strengthened, official places are increased in number and the costs of administration are augmented, because the salaries of officials who wish to live on their pay alone, must be related to their needs and status. Experience shows the truth of this observation, and if you were to transfer the important activities of the *Landräte* to paid officials of the non-propertied class, then most certainly the costs of the *Landräte's* administration would rise. Further, my official experience convinces me, firmly and vividly, of the excellence of properly constituted estates, and I see in them a powerful means of strengthening government by the knowledge and standing of all the educated classes, of binding them all to the State by persuading them by participation and co-operation in national affairs, to give the energies of the nation a free activity and a direction towards the socially useful, to guide them away from wasteful sensual enjoyments or from empty metaphysical brain-weavings or from the pursuit of merely egoistical ends, and to maintain a well-educated organ of public opinion, which one at present vainly attempts to gather from the opinions of individual persons or individual groups.'

'If one is convinced of this truth, that the participation of the property-owners in Provincial Administration would lead to most beneficial consequences, then we must turn our attention to laying down what business should be transferred to them. . . . Economy in administrative expenditure is a less important advantage which will come about by the acceptance of the suggested participation of the property-owners in Provincial Administration; much more important is it to vivify the social spirit and civic sense, to use the latent or falsely directed energies, the unassembled knowledge, to connect the mind of the nation, its opinions and creeds, with that of the State Departments, to resuscitate a feeling for the Fatherland, independence and national honour. The miscellaneous formalities and official routine of the Departments will be shaken to pieces by the appointment of people from the pell-mell of practical life, and in its place there will come a more energetic, strongly striving creative spirit and a wealth of opinions and attitudes taken from the fulness of Nature. . . .'

Similar judgements are to be found scattered throughout Stein's written remains. For example:

'We are governed by *paid, book-learned, disinterested, propertyless* bureaucrats; that will suffice so long as it suffices. These four words contain the character of our and similar *spiritless* governmental machines: *paid,* therefore they strive after maintenance and increase of their numbers and salaries; *book-learned,* that is, they live in the printed, not the real world; *without interests,* since they are related to no class of the citizens of any consequence in the State, they are a class for themselves—the clerical-caste; *propertyless,* that is, unaffected by any changes in property. It may rain, or the sun may shine, taxes may rise or fall, ancient rights may be violated or left intact, the officials do not care. They receive their salary from the State Treasury and write, write in quiet corners, in their departments, within specially-built locked doors, continually, unnoticed, unpraised. And then again they educate their children for equally useful State-machines.—One machine (the military) fell on October 14th, 1806. Perhaps the writing-machine will have its 14th October! There

is the ruin of our dear Fatherland: bureaucratic power and the *nullity of our citizens*!'

Such quotations could be repeated *ad nauseam*. They would add nothing to the essential conception of these two passages which make quite plain the extent to which the Prussian Civil Service had been smitten by the peculiar blight of that particular profession. Similar views were shared by Stein's friends, and we need not expatiate upon them.[1]

The Service lacked life, inventive power, ability to serve the needs of the population, enterprise: impotence had overcome it and it was out of touch with the life which surrounded it.

Character of the Bureaucracy in the Nineteenth Century. Judgements of that kind continued to be passed upon the Civil Service throughout the course of the nineteenth century. What is extraordinary, however, is that the rest of the world somehow formed the belief that this Civil Service was the ablest in the world; and in fact, it did some first-class work. Even while Stein was writing in retirement it carried out, under Hardenberg's Chancellorship, many far-reaching reforms, and it continued to do so until after the middle of the nineteenth century, without the co-operation of a representative assembly. There is no doubt that it did good work: there is equally no doubt that great trouble was taken to make it an efficient instrument by careful attention to the conditions of its recruitment and discipline, and political thinkers, especially those of a romantic cast of mind, like Adam Müller, himself at one time an official, and Hegel,[2] looked to the Civil Service, as the saving caste in the State. But, apparently, some critics thought life was better without State activity and Civil Servants, while others believed that good work could have been improved and purchased at a smaller material and spiritual cost to the nation had representative assemblies shared its absolute power.

By 1800, a reform should have been made of the educational preparation for the Service to correspond with the tasks set by an age new to Germany. It is material, therefore, to review the type of criticism passed upon the ethos, and the mentality of the Service. We later proceed to a study of recruitment in the nineteenth and twentieth centuries.

* * * * * * *

In 1844 there appeared at Hamburg a small book entitled *Bureaucracy and Officialdom in Germany*.[3] Upon the title-page appears a

[1] E.g. in the tract, *Woher und Wohin*, by Staatsminister von Schön.

[2] E.g. Adam Muller, 'The politicians and the Civil Service produce the State'; Hegel, *Philosophie des Rechtes*, paras. 287 ff.: 'Here is found the conjunction of universal and particular interests, a union which constitutes the conception and the internal stability of the State.'

[3] *Bureaukratie und Beamtentum in Deutschland, I. Preuszen*, Hamburg, Hoffmann and Canute, 1844, p. 72. The author's name does not appear, and the book pur-

quotation from Ancillon, the Prussian Minister, which runs: 'Kings have really only two things to fear: the one-sidedness of opinions and resolutions, and the egoism and vices of officials. The only power to counteract these is the establishment of representative assemblies and the local authorities, and a free press.' The author attempts to show how enormous is the size of the Service, an exercise which earlier and later generations have all enjoyed. He arrives at a total of 700,000,[1] and says: 'These 700,000 promote the welfare of the subjects, secure their life and property, administer education and instruction, judge evildoers and edit, inspect, super-edit, control, decree, foster, journalize, chew over, insinuate, execute, remit everything, and so on.'

Civil Servants are accused of lacking patriotism, which in their case is replaced by an egoistic seeking after material advantages: 'The State is considered a milch-cow.' Such an egoism can be cured by nothing less than decentralization and a diminution of governmental activity. The Service had become a caste, sundered from the rest of society, in particular, owing to the stringency of official secrecy, which unduly prevented Civil Servants from discussing affairs with the public whether orally or through the Press.

The heart of this discussion lies in the analysis of the ethical code prevailing in the Civil Service. The anonymous writer refers to Schon's comparison of the Prussian bureaucracy with the Catholic Church: 'The Prussian Bureaucracy is an institution in the same sense as the Catholic Church.' This comparison, seemingly paradoxical, is of surprising truth, and 'it is a curious contrast, that the first Protestant State of the Continent uses, as the basis of its administration, a principle which is the strongest pillar of Ultramonism'. (Not so curious or surprising, as we shall see when we arrive at the end of our discussion of modern administration.)

'This principle', says a German newspaper, 'may perhaps not be expressed in the official canons of the Prussian administration, but it is nevertheless existent: it is a certain stability of the administrative mentality which, as through tradition or occult power, lives on from generation to generation, and understands how to make itself independent of persons, and sacrifices unto itself all people with different views.'

Like the Catholic Church, it tolerates no deviation from the faith, not the slightest, lest one change produce a greater. Fearful of losing its power, it does not accommodate itself to progress.

'The spirit of Prussian administration is in many respects in direct contradiction to the spirit of the Prussian State, that is, the Prussian Government,

ports to be a translation from the English of the steward of a Lord, who was in Germany for nearly ten years. The book is written with so much animus, such a bitter hatred of the bureaucracy that it is doubtful whether an Englishman would have been so interested in German affairs.

[1] They include the judicial authorities, the teachers and the clergy.

and should the Government desire to be never so liberal, the Administration will maintain the opposite tendency as long as it can. The contradictory elements are, on the one side the spirit of the Reformation State, on the other, organization according to the military State. The former is the ally of popular activity, the latter the resort of reactionary administrative activity. Bureaucracy can as well be compared with the military system as with a hierarchy, and is often compared with it. The three are parallels: military, hierarchy, bureaucracy: all rest upon the divine right of despotism, which wills no exception, no leniency, no progress, but only blind devotion and the eternally unchangeable acknowledgement of its infallibility. The three maintain themselves by unconditional obedience; the means by which obedience is maintained is fear; and this is maintained by dependence. The dependence of Prussian Civil Servants is rigidly secured by two devices: secret reports and the strict maintenance of official secrecy. The former reminds officials every moment of their superiors; the latter of the office' (pp. 34 and 35).

The result is a machine directed against the people, at least, when the people's will is something other than the will of the Service. Within itself the organization receives its direction and energy from suspicious severity, and the control of detail by superiors, not from trust of the freely exercised discretion of subordinates. The moral strength of the officials is not evoked; and with all its mechanical accuracy the administration lacks a spirit of honour. The translation of the *Ten Commandments of Officialdom* shall conclude our account of this anonymous diatribe.

'I. *Thou shalt have no other Gods but me* is the first Commandment of the Chief, whether he is at the head of a Ministry or of a Patrimonial Court with two officials, whether he administers the finance of the whole country, or merely collects a poor rate. This auto-deism, this self-worship, is officialdom's common holy creed, its one glorifying article of faith: whoso does not follow it is treated and persecuted as an apostate or a heretic—if not with actual fire and sword, yet in a fashion which burns and smarts as though with fire.

'II. *Believe in my infallibility and acknowledge it slavishly!*—a superior officer is above all errors; and the words which he hourly has upon his lips are: I never err; I can judge by myself; only I have the right to make a decision. What I say and command, has the force of law and there is no legal recourse against it. It must be executed, that is to say, what I will must happen, otherwise you risk your life.

'III. *Do not contradict me!* Whoso violates this rule has forever lost—a salary.

'IV. *Thou shalt not be heard!* For *I* propose increases of salary.

'V. *Remember the secret conduct reports!* I am the Almighty Judge of this holy and secret officials' *Vehmgericht.*

'VI. *Thou shalt not be seen!* I propose Titles and award Testimonials.

'VII. *Thou shalt not covet the pleasure of talking evil of me!* The "Cruel President" is the chief character in the German theatre.

'VIII. *Be faithful and true to me!* I can obtain an extra job for you.

'IX. *Honour me and betray me not!* I propose—Honours.

'X. *Show thyself always pleasing to me*; because, know this, I dispense the fund for Gratuities.

'Thus, the Ten Commandments of the Official Divinities. *Subordination* is the Holy Ghost which speaks with fiery tongue and permeates and illuminates every one.'

There are many other opinions of interest in this brochure, but the chief substance has been given and it shows, we think, where the fault of the Prussian Civil Service was considered to lie in the decade 1834 to 1844. A year afterwards this criticism was supported by a book called, *The Prussian Bureaucracy.*[1] Its temper is similar to that which we have just described, but it surveys the field with a more level and composed demeanour. It is antipathetic to the Civil Service because that Service is not directed and controlled by the people, and the author deems that from this fact flow a number of evils, chief of which, summarily described, are bureaucracy in the Service and the political nonentity of the citizens. Since 1815, in fact, the Civil Service had been the instrument of oppression of Liberalism, and it is not surprising to find here as elsewhere judgement centred not upon any examination of the technical efficiency of the Civil Service in its admitted purposes, but upon the *political* complexion of the critic. Were the writer convinced of the value of an absolute, anti-liberal State, then the Civil Service seemed to him a splendid instrument; but were he in the ranks of those like Börne and Heine who fought for a Liberal Constitution, then the Civil Service was at once dubbed a bureaucracy and reproached with showing all the worst features inherent in such a governmental system. The author whose work we are now discussing confesses this power of the point of view over the judgement, for he says:[2]

'It is one of the chief purposes of this book to show, by an appeal to facts, that the Administration in Prussia is in no way qualified to be a substitute for the Constitution, that much more, it is the administration which makes a Constitution most urgently necessary, together with the freedom of the Press and every kind of publicity belonging thereto.'

It is from this level that the author surveys and describes his field.

It is not the organization, he says, that makes a Civil Service bureaucratic, but the spirit that moves the organization.

'By bureaucracy we here naturally mean not the form, but the spirit, not the body, but the soul. We mean what has generally come to be denoted as bureaucracy: the surplusage of officials and their activity, the abuses and evils of officials and departmental authority. The word bureaucracy is invective, which we cannot properly translate into our mother-tongue any more than we translate such words as despotism, canaille, etc.'

This bureaucracy directly issues from Prussian absolutism. For absolutism is to be maintained only by centralization and a military and civil army. Although such absolutism came to pass under

[1] *Die preuszische Bureaukratie*, von Karl Heinzen, Darmstadt, 1845. Parts of this work, which had appeared as articles in the Press, had been plagiarized by the earlier work, especially the comparison between the Catholic Church and the Military Service.

[2] Op. cit., p. 71.

previous rulers, bureaucracy originated only when the Head of the State lacked energy and benevolence. For these, as it were, are the salt which preserves absolute monarchy from deteriorating into bureaucracy. Frederick William III had not the character either to realize the absolute state by his personal force and application, or to call in the people to share in the task of government. His only resource was to construct as completely as possible 'the official, the documentary and the police state'.

'This kind of State promised best of all to accept the role assigned to it: to be an ever-ready instrument, mechanical, meticulously systematizing, regulating in military style, and never overstepping the customary measure and therefore never following its own. Once the rules were laid down one needed only to keep within the track and could then arrive happily without being troubled by special inconvenience and danger.'

Thus, this force grew beyond its original conception and finally ruled not only the people but even the King; just as long ago the Praetorian Guard had acquired the power which they had originally been employed to establish for the Emperor.

In such a system it was bound to happen that the Civil Service felt its significance and status to be bound up with opposition to the people. It was forced by the situation in which it was placed, as defender of absolutism against the demand for representative government, to make its primary purpose consist of its own continued being and activity. It could not criticize its own composition and seek to remedy its defects or invigorate its spirit, nor could it tolerate criticism from without. Benevolent in intention, in manner it could not but be oppressive. 'In England orders were given by the Ministers who acted on behalf of the people; in Prussia orders were given by the Civil Service not only to themselves but to the people.' There had been some hope of improvement during the dark days of the Napoleonic victories, but with the fears vanished the will to reform. The bureaucracy knew very well that had there been reforms of any significance its hour would have struck. If it now set itself up as a substitute for a Constitution, we should expect it to be perfect. But what imperfections it possessed! It was extravagant, considered its own interests prior to the people's, did not give the latter a clear and honest reckoning, could not bear the light of publicity, shuddered at every breath of freedom, used secret and dishonest means to obtain its ends, demoralized the people. . . . Some laws showed bad drafting, though drafting was one of the things upon which the Civil Service prided itself.

The usual comparison with a military force is made.

'The military State and the bureaucratic State do not merely exist the one beside the other, they co-exist, they mingle. This occurs, on the one side,

by the centralization of both institutions in the hands of an absolute ruler and by the material support of the one by the other, on the other side there is the arrangement whereby military persons after a certain number of years of service are allowed to transfer from the military to the civil service. By this means the civil service is constantly being filled to an extraordinary degree by the military element and provided with thousands of tools who are accustomed to command the inferior as much as they are to obey their superiors.'

Stein had called this organization 'spiritless'; another official of genius had denied its power to think, a famous publicist said that

'in the murky, thick and close air of the office, the Civil Service, ever brooding over papers and memoranda, developed a documentary cretinism which deranged all higher mental powers and raised their gland-secretion activities to the point of monstrosity.'

The writer then analyses first the relationship between the Civil Servants and the public, and then the relations of the Civil Servants among themselves. We cannot follow out the analysis in the text, but the material portions thereof will be found in the footnotes and the attention of readers is especially called to the first on the Civil Servant and the Public, to the second which describes the relationship of superior and subordinate, and the third, which considers the problems raised by the Secret Reports.

The relationship between Civil Servant and the public may be epitomized in the words of the author as: 'The limited vision, the pedantry, the dark ignorance, inhumanity and arrogance' of the official, and the lack of remedy of the public.

This continued until the recent past to be a characteristic of the German Civil Services, not merely the Prussian, and history quite clearly shows that the reason of it is the lack of Parliamentary institutions, or perhaps it would be truer to say, the Parliamentary state of mind. While that state of mind lacked force, absolutism prevailed, and every Civil Servant was bound to be actuated by the intentions, benevolent, offensive and defensive, of the master spirit. Hence the analysis presented in the work now under discussion, and similar analyses thenceforward until the present time.[1]

The relationship between superior and subordinate is analysed with much acuteness of mind and is evidently founded on experience. On the one side there is the lust for power and dominion, with their cognate qualities and behaviour, and on the other side, cringing ser-

[1] Heinzen, p. 144 ff.: 'The distinction between the office and the official should in the political world be maintained as steadfastly as the distinction in the literary world between the poet and the poem. But this conception is more difficult to teach an official than a poet. By their behaviour, with sinister conceit, they not seldom set themselves above their profession, and instead of being the servants of their office, they wish merely to use it, in order to act as masters.' Louis XIV said: 'I am the State!' Very many writing-desk-kings and office-Louis wish to copy him and say: 'my office—c'est moi!' The writer talks of 'such official anthropomorphism'; and does not spare the faults of bureaucracy.

vility, sycophancy, and those habits which men develop to propitiate the object of their fears,[1] and, further, the necessary degeneration of all qualities of initiative and independent creativeness in the official.

The Secret Reports constitute a vital element of the German Civil Service: an indispensable incentive to produce the character approximate to the times before the advent of democratic control. The system threw the Civil Servant entirely under the domination of his superior. Until the Constitution of 1919 these reports could not be inspected by the person reported upon, and though, between 1845, when this account was written, and 1919, a disciplinary procedure was established which went far to abolish the arbitrary, the Civil Servant could never know what sort of a storm was brewing which might one day unexpectedly burst upon him. The moral atmosphere of the Departments was charged with mistrust, espionage, fawning humility and minor treachery.[2] The compelling proof of political importance is inclusion in the Constitution: and the right to inspect these reports was included in the Constitution of 1919.

Survey. Before we can pass to a consideration of the period from 1850 or thereabouts to the present, let us survey the position so far reached. Prussia, and with some variation the other Germanic States, was governed in the middle of the nineteenth century by an official hierarchy which was intensely bureaucratic in temper, uncontrolled by any popular representative institution[3] and contemptuous of such, its jurisdiction of exceedingly wide extent and managed through centralized institutions, excellently efficient in formal and routine functions and adept at the drafting and interpretation of rules and laws. This efficiency was assured by the rules of recruitment, and the ascription of a special social prestige to the Service.[4] These did not any longer produce inventiveness and plasticity of mind. Of this we have Bismarck's assurance based upon his own experience as *Referendar* just before 1840.[5] We shall see that as soon as Germany was called upon to serve positively and construct

[1] Op. cit., p. 161 ff.

[2] Op. cit., p. 166 ff. The effects on the service are thus analysed: 'It is very natural, that the chief concern of the subordinate will not be to fulfil his duty and satisfy his conscience, but to propitiate his superior; that he will do his duty not for its own sake, but always with an eye to the secret reports and his superior; that he will do his work only according to his moods and weaknesses; that thereby he learns to make pretence the chief thing, and therefore the official who dances best to the superior's tune comes to be considered the best official, that withal all independent sense of duty, issuing from conviction and personal initiative, falls into discredit and loses prestige. . . . What a temptation to the domineering and unjust on the one side, and what a school of servility and abasement on the other!'

[3] Cf. J. S. Hoffmann, *Monarchisches Prinzip* (1911), p. 19.

[4] Cf. Perthes, *Der Staatsdienst in Preuszen* (1835).

[5] Cf. *Reflections and Reminiscences* (Tauchnitz, I, 33): 'The officials of the right worshipful royal Prussian Government were honest, well-read and of good breeding, but their benevolent activity did not always meet with recognition, because from want of local experience they went to pieces on matters of detail . . . etc.'

in the field of modern social and economic problems, instead of merely to keep order, the Civil Service was deemed either to be insufficient by itself, to need the aid of other institutions, or to require a radical reform of its education. In the general analysis of the problem of Civil Service activity we argued that it was impossible to state the efficiency of a Civil Service in quantitative terms: in other words, to rate it. This holds good of the Service we are now describing. It is possible to find dozens of analyses such as those we have already reviewed in the course of this discussion, but there is none which has not its own subjective scheme of values and standards. These are proper to the author and they determine his adjectives. There is no calibrated precision in any judgement, even in those where the authors would most desire them.[1] Fear, contempt, obedience, loyalty, high praise were the various actual tributes paid to the Service and they were never expressed in a quantitative assessment. If, then, the Civil Service was praised for its competence, it was by reference to a *Weltanschauung*, and not seldom by comparison with the truly wretched technical defects of the Services of France, England and the U.S.A. If, on the other hand, it were censured, it was less on account of the ability with which it did its work than on account of the ultimate rightness or wrongness of that work being done at all.[2]

The books and the men I have consulted lead me to believe that between 1815 and 1871 the technical efficiency of the Prussian Civil Service was of a very high grade, and on the whole quite sufficient to the tasks imposed by the political, social and economic conditions of the time. Not, indeed, until the third quarter of the nineteenth century did that country begin to be shaken by the mighty travail of a new order of State and society, and until the issue of that travail required official care the old dispensation worked not unsatisfactorily.

Social Composition of the Service. The Prussian Civil Service was in its upper ranks the product and the monopoly of two classes—the nobility and the upper middle class, or the 'bourgeois patriciate' as it is commonly called. The avenue to power was not open to the classes lower than these, for the necessary educational preparation presupposed means which could maintain a young man in easy and respectable circumstances until about the age of twenty-seven or twenty-eight.[3] Even were these means available, yet further obstacles were placed in the way of general recruitment: the candidate was required to be 'friendly to the State'—that is to say, Conservative, of family standing, a member of students' *corps* or a reserve officer, and as a rule a Protestant Evangelical. Hanover was especially subject to the class monopolization of the Civil Service.[4] There were

[1] Cf. Perthes, op. cit.
[2] Cf. Cobden's tribute to its efficiency; Morley, *Life*, Letter, 1838.
[3] Perthes, op. cit. [4] Cf. Oncken, *Rudolf von Bennigsen*, Stuttgart, 1910, I. 33 ff.

certain advantages about this method of recruitment: the family tradition of State service was a valuable guarantee of loyalty and devoted industry, the young men had a habit of government, and a sameness of origin gave rise to *esprit de corps*.[1] But what was praised as *esprit de corps* by one set of people was blamed by ever greater masses of the population as the caste spirit, not something which impelled to the *élan* of concerted activity but that which fostered a forbidding exclusiveness. The habit of government learned on Junker estates was apt to take on a sinister aspect to those who experienced its exercise—class rule and class government were bitterly resented, and the bureaucracy, especially those who were drawn from the army, was the anathema of the growing working-class movement. Loyalty and devoted service are not synonymous with administrative and political creativeness, nor with service to the whole of society regardless of class privileges. But here the discussion of German bureaucracy must merge with that of other countries. We shall compare their ultimate solutions in the same chapter.

[1] Cf. Hegel, op. cit., para. 297: 'The members of the executive and the State officials constitute the main part of the middle class, in which are found the educated intelligence and sense of right of the mass of the people. . . . The sense of state and the most conspicuous education are found in the middle class, to which the State officials belong.'

CHAPTER XXIX

ORIGINS AND GENERAL CHARACTER: FRANCE

ANALYSIS of the growth of German administration has made us aware of the problems encountered in its growth, by the modern state, and it is not necessary to enter into such detail for France. Yet we must make acquaintance with the chief characteristics of the administrative institutions and manners to which the France of the nineteenth and twentieth centuries was heir. For the history of these later years has consisted very largely of the attempt to escape from the deficiencies of the administrative organization and spirit developed in the centuries we call collectively the *ancien régime*. The attempt to escape has been less forceful than the avowal, so that the *ancien régime* is still more than a reminiscence.

The features of French administration which leap to the eye from the study of its development are Centralization, *Étatisme*, Venality of Offices, Passion for Place, Caste-differentiation of Officials, Popular Detestation and Suspicion of Public Administration, and the Establishment of Administrative Law.[1] All of these, excepting the Venality of Offices, are still present in modern France, but with differences of importance due to the influence of respect for private and local liberties and the abolition of arbitrary government. The Venality of Offices was killed by the revolutionary principle of 'the career open to the talents', though it has taken over a century to destroy its successors, Favouritism and Patronage, and replace it completely by recruitment by merit. These qualities are products of the *ancien régime*, and the widely-current popular notion that centralization and the power of the State are Napoleonic creations is erroneous: Napoleon was given as many opportunities as he made.

Centralization. France is the classic home of centralization, as it is of the doctrine of royal sovereignty, and for the same reason. These are not emanations of the French racial character, but the direct results of French feudal arrangements, which created hundreds of independently privileged lords and localities. The first result was a polyarchy indistinguishable from anarchy, though it was then the

[1] Administrative Law is not discussed in this chapter, but below, in Chap. XXXVI.

natural order of society, and the second, rivalry between the equally privileged for personal predominance This competition among ducal houses filled the twelfth to the sixteenth centuries with war, rapine, daily violence, assassinations, murderous treachery, cynical ruses, misery among the common people, periodical despoliation of the *bourgeoisie*, while Kings and would-be Kings died early and sudden deaths by poison or the dagger Yet fitfully a single power added to its dominions Under Louis XI and Charles VII, in the last quarter of the fifteenth century, one ducal house after another was destroyed by bloody executions and the appropriation of its lands, and the authority of the Kingly house was extended not only over territory but over economic and social life The usual phenomenon of centralizing power was witnessed, the Crown called to its aid not nobles, but clever and insignificant persons, and it showed mildness towards the *bourgeoisie* By the end of the fifteenth century Monarchy had established itself, and from that time it sought to make good its hardly-won authority by the imposition of its governing will all over its diverse conquered lands The Italian wars at the turn of the century, the struggle with Austria, the Wars of Religion, lasting till nearly the end of the sixteenth century, did not entirely stop this process, but it required a warrior and statesman as capable and bold as Henry IV and a counsellor of genius and extraordinary devotion like Maximilian de Béthune, Duke of Sully, to overcome the disruptive forces, reinstate peaceful unity and make the monarchy an ever-present condition as well as a name The days of the centripetal forces were numbered Richelieu converted, as we shall show later, the local military agents of the central authority into the normal civil government of the provinces, and his pupil and successor, Mazarin, vanquished the last great noble resistance to the royal power *La Fronde* From the accession of Louis XIV the monarchy was unchallenged by the feudal pretenders and it turned its attention away from the first task of all governments, the reduction of opposition, to the second, the regular provision of daily utilities Long reflection upon the struggles of the monarchy with its noble competitors, has convinced me that the grimness of French centralization was a direct and natural answer to the ungovernable refusal to be governed Its exaggeration exaggerated centralization, which persisted throughout the reign of Louis XIV and Louis XV in both it was the source of bitter complaint by the Parliaments and local authorities Under Louis XVI it continued to function, but towards the time of the great Revolution its character softened, its despotism became, in the language of the late eighteenth century, 'enlightened' and 'humanitarian'. Nevertheless, a formidable despotism it was, the people had no effective part in either central or local decisions, and it required even more than the Revolution of 1789 to secure it Centrali-

zation, for the inception of which there had been reason grounded in vital necessity, remained in existence owing to the laziness, the cowardice, the ignorance of governmental science, the want of conscience, of Kings and statesmen, and the waste of time and resources upon foreign wars.

Let us see through what institutions this centralization operated. The monarchical power was extended by the institution of Intendants, that is, by representative managers or administrators. Their history appears like successive waves from a central source—a weak and transitory movement first begins; the next is more definite as the purpose of Richelieu and Colbert behind it is more conscious and deliberately planned, and it overwhelms the ground before it by its purposeful force; the tide being full in the last years of Louis XIV and the reign of Louis XV, it masters all obstacles and it recedes only when the monarchy under Louis XVI is affected, though not completely convinced, by the strange but compelling philosophies of the democrats and the Encyclopædists.

Since Tocqueville wrote on this theme a multitude of studies have appeared, but none trace the history continuously from, let us say, Richelieu's time. French scholars themselves deplore this,[1] but with *the exception of scanty sketches, no continuous narrative has been* produced. The student is compelled to piece together a number of monographs which not infrequently overlap and always leave gaps. Most characteristic of the kind of attention paid to administrative history is this, that the writers are interested only in the highest officers in Paris and the Provinces, but have little interest in the subordinates who, without any doubt, as we know from contemporary government, must have been the aspect of administration most apparent to the five senses of the governed. These are, however, dismissed in the lump, in the discussions of Venality and Patronage, and are with insignificant exceptions otherwise unchronicled.

The Intendants. Much has, however, been said about the Intendants. Some writers relate them, though remotely, to the *missi dominici* of Charlemagne and the *enquesteurs royaux* of Saint Louis,[2] and it is true that these magistrates were sent into the provinces on missions analogous to those later undertaken by the Intendants. A careful and discerning historian, M. Hanotaux,[3] shows that the intendants began as itinerant justices, of inspectorial and appellant rather than original jurisdiction—began, that is, in the institution

[1] E.g. Lavisse, *Histoire de France*, VII, 177: 'Il n'existe pas, pour la période moderne de notre histoire, des manuels scientifiques qui soient des guides dans l'étude des institutions et des moeurs comme on trouve pour l'histoire de l'antiquité et du moyen âge; c'est une très regrettable lacune.'

[2] Chéruel, *De l'administration de Louis XIV*, p. 60 (1850); Villolet, *Le roi et ses ministres* (1912), follows Chéruel.

[3] Hanotaux, *Origines de l'institution des Intendants des Provinces* (1884).

known by the graphic name of *les chevanchées des maîtres des requêtes de l'hôtel.* The *maître des requêtes* were judicial officers who originally received complaints and requests addressed to the King, and reported these to him; they sat in judgement, with the King, upon these requests. In the interests of royal justice, which not infrequently was in competition with that of the Parliaments and the relics of feudal courts, they went on circuit through the provinces.[1] These were their status and functions in the middle of the sixteenth century with which we are now concerned; their later history is interesting but belongs to another part of this study.

Later, other commissioners were sent into the provinces. Their mission was of a more permanent nature though similar in kind to that of the itinerants, and they did not replace the latter. To these were added other officers, called Commissioners, whose functions differed according to time and place, differed in range of details, extent of authority, and duration. Military, judicial, financial and administrative affairs occupied their attention according to the royal commission given to them. Though these exercised the royal power, they were not called intendants, and the true origin is to be sought elsewhere—as the pacific offshoot of the military force which alone in France, as elsewhere, first gave kingship a kingdom grounded in authority.

The intendants first appeared in the provinces in the company of the commanders of the royal armies when civil or foreign war was rampant. Tentatively established earlier in the century, they were withdrawn during the Wars of the League. After Henry IV's victory their numbers increased, and they appeared as organizers and arbiters to secure the pacification of the troubled areas.[2] They exercised powers which varied with the necessity for the exercise of power. They were called 'intendants of justice, police, finance, victuals and of the military authority', and 'commissioners sent into the provinces to execute the orders of the King'. As we have already learnt in our analysis of German administration, the term 'police' has a very wide and important meaning, signifying nothing less than 'government'; and the vicissitudes of the central authority were reflected in the titles of the intendants, some including all justice, police and finance; others but one or two. Their functions with the armies soon became insensibly attenuated, especially as the armies left; and

[1] 'and received complaints from any persons and inserted them in their record'. Cf. Babeau, *La Province sous l'ancien régime*, Vol. II, Chap. I.

[2] In the royal embarrassment Henry IV 'had recourse to the only means practicable in such abnormal circumstances, an irregular and extraordinary means, but which was the only resource of the Government in extreme anarchy: the employment of officials with unlimited and indeterminate power, masters of everything, themselves with only one master, their initiative and their personal qualities being the only cause and the only limit of their authority' (Hanotaux, p. 42).

the term 'Commissioner', which savoured of unsettled, warlike, abnormal times, ill-accorded with the character of the intendants after the Fronde, and was, in fact, mainly used as a term of disapprobation by opponents of centralization before and after the great Revolution.[1] It took nearly a century, from about the last quarter of the sixteenth until the middle of the seventeenth century, for the intendant to shed his military character, and become part of the normal apparatus of government. This development of peaceful administration out of the highly political work accomplished by military conquest compares fairly closely with that of Prussia, though in Prussia it was accomplished much later and the military spirit contrived to dominate the mentality of the central and provincial authorities. We can accept the distinction made by the historian of Amiens [2] between the period before Colbert, which he calls *political*, and that after Colbert, which he calls *administrative*, though it is open to every one to learn from Colbert's life and correspondence how the obstinate will of the monarch and his Ministers to govern still struck down its opponents by fines, imprisonment, and hanging, though massed armies had long finished the main part of the work. Of this occasional repression to secure order the early intendants were the instrument.

From the beginning the intendants roused the hostility of the quondam rulers of the provinces and towns. The early commissioners had been criticized by the nobility and the clergy, who had demanded their recall. These early intendants did not stay long, a year or two was usual, and gaps of years often elapsed between the withdrawal of one and the commissioning of a successor, and further, their powers varied. The natural irritation of the local rulers at the incursion of a stranger armed with great power was thus increased by the recurrence of fears, anxieties, and the need for adaptation, attendant upon the irregularity of the terms of an already unwelcome stranger. They intervened in matters which were peculiarly liable to cause local disaffection: justice, finance, and municipal politics. In the first, they came into conflict with the nobility and the clergy, whose claims they often had to deny, and against whom they had to give judgement. In regard to finance, they had the power to examine the accounts and procedure of the collectors of taxes and deal with malversations and to see that recalcitrant evaders were pursued. Their judgement was above appeal save to the royal council. And they could participate in the work of all courts of justice, preside even, give judgements, while the judges and royal officials were commanded by the Crown to obey and implement their decision. They settled differences between the officials themselves. In municipal politics they received powers which enabled them to call a truce to disputes of local factions which

[1] E.g. De Tocqueville uses the term in *De l'Ancien Régime*.
[2] Boyer de Sainte-Suzanne, *Intendants de la Généralité d'Amiens*, p. 87.

in some places resulted in chronic disturbance of the peace, and these powers became in the long run so great that local self-government became disastrously limited, the forms remaining with the municipalities, while the authority was transferred to the intendant. The omnibus terms of one of the commissions gives a good idea of what a determined King or Secretary of State or a zealous intendant could do. This dates from 1617.

'As also we command and order you to inquire into the order and condition of the police, and the due administration of the affairs of the towns and communities of the said province (Poitiers), to hear out and listen to their general and particular plaints, deal with them summarily, by yourself if you can, if not by the judges of the places or by any others that you depute; inform yourself of the condition of our affairs and services in the towns and province, and especially what concerns our edicts, statutes and rules, the observation thereof, the quiet and pacification of our subjects; of all this a report is to be made and sent to our council, so that we may see what is to be done for the good of our service,' etc., etc.[1]

The intendants were chosen among the most intelligent and dependable members of the King's Council and they corresponded with the Secretaries of State, sometimes with the King.[2] We shall have occasion later to see the kind of exhortations and reprimands by which the central power directed its agents. In the province they applied the *raison d'état* as learnt directly in the Council of State, and they did not stay in the province long enough to suffer this to be modified; often, indeed, they attained high power in the Council of State. Just before the reign of Louis XIII and the advent of Richelieu their powers were already great, an increased assurance is observable in the tone of the royal commissions—the words *power*, *authority*, *commission*, *special command*, *will* and *ordain*, *enjoin*, *authorize*, *approve* and *validate* are scattered with generous profusion. '*Car tel est nostre plaisir*,' signs the King, to all other existing authorities who are by the Commission made the executive agents of the intendant, whether in a subordinate or co-ordinate position.

With the advent of Richelieu the final stage in the development of the Intendants commenced. There was a change of such striking quality in spirit that many historians have ascribed to Richelieu the inception of the system. But Richelieu's genius consisted in the infusion of the existing institution with the full creative force of his own personality. When full power came into his hands in 1671 he chose his own men and gave them orders which transformed the institution from an experiment which might end to one whose new seeds might be fully cultivated by the work of men like Colbert and Louis XIV. It was the beginning of creative centralization, and Richelieu's inno-

[1] Hanotaux, op. cit., *Pièces Justificatives*, XII, 239.

[2] Cf. De Luçay, *Les Secrétaires d'État depuis leur institution jusqu'à la mort de Louis XV* (Paris, 1881), Chap. III.

vating genius and fierce energy electrified the provinces, and in time reduced them to submission, but not complete acquiescence. Intendants were sent to every *généralité* (divisions of a province) excepting the two or three nearest to Paris. The mere reception of an intendant by a province was, however, in those days a victory for the monarchy, for the *Parlements*, i.e. all the lawyers, in particular were desperately hostile and the centres of local resistance. The numerous edicts and statutes gave them unlimited opportunity to challenge royal power, and they used the fine arts of interpretation to invalidate the intendant's jurisdiction. Their ultimate resort was the refusal to accept any royal commission which they had not *registered*, that is, discussed and accepted as due law. In 1626 the Notables protested against this '*nouvel usage d'intendant de justice*', prayed for the revocation of these functions, and suggested that no opposition would be offered to the old institutions of the itinerant *maîtres des requêtes*. The remonstrance was rejected. Serious disaffection occurred, and, at Bordeaux, and other places, even revolt. The result was only to increase the resolution of Crown and Minister. An opportunity soon occurred for them to regularize the position of the intendants and thus avoid the charges of illegality. The celebrated *Code Michaud*, an *ordonnance* to reform the Kingdom, was drawn up in 1629. Article 58 of that Code prescribed the powers of the *maîtres des requêtes*, and in such wise that its negotiation by the *Parlements* was certain. At a distance of 23 articles from this, that is, in Article 81, was insinuated the rule that 'No one can be employed in the office of intendant of justice or finance, deputed by us in our armies or provinces, who is . . .' and then follow a few prohibitions. The institution was thus established in the law, for discussion ceased at Article 13, and Article 81 was passed without discussion.[1] By the systematic execution of disobedient nobles and the destruction of the great medieval and feudal symbol of government, the fortified castles, Richelieu paved the way for the further development of the central power. Not much advantage was or could have been taken of this till the majority of Louis XIV, as foreign affairs, the Fronde and its aftermath, involved the country in confusion and absorbed all energies. The Fronde, in fact, was the last attempt of the vested interests of feudalism to put off the triumph of the absolute State; the nobles united with the richer *bourgeoisie* to smash the power which threatened to make away with their privileges and to collect the taxes it demanded. The absolute State won, in terms too easy, as the Revolution afterwards showed—and the trustees of this victory were, for the next century-and-a-half, the monarch, his Ministers, and the intendants. *Salus provinciarum repressa potentiorum audacia* was the device upon the medal struck by Louis XIV in 1666;

[1] Cf. Picot, *Histoire des États Généraux*, V, 118 ff., for the code.

but violent repression cannot be meted to a scale, nor the audacity of the great easily repressed.

Colbert. Under the rule of Colbert, supported by Louis XIV, whose application to administrative detail earned him the name of *roi administrateur*, the powers of the intendants increased in effectiveness.[1] Wherever any of the older authorities showed a weakness, as for example in the affairs of the clergy and the Universities, the intendants stepped in to advise, control or directly to administer. Wherever there was no authority, adequate to new tasks projected by the Ministers, the making of roads, canals, bridges, fortifications, the regulation of industry, the intendants were saddled with new functions. They were expected by the King to control the *Parlements*, and they did, though in the face of shrill remonstrances.[2] We shall see later how perfect centralization was rendered impossible by the sale and hereditary nature of offices, how, since the revenue derived from these was essential to monarchical policy, this very necessity meant the creation and maintenance of independent magistrates who could oppose the royal power.

Colbert was an utterly callous administrator. Once convinced that his purpose was good by *raison d'état* (or, as we might say, with perfect truth to political psychology, *raison de l'état Colbert*) he searched for the means best adapted to fulfil it, and this discovered, he had none of our conventional scruples: he dismissed, appointed, rotated officials, gave and denied favours, served with his tongue in his cheek, and detracted his equals and superiors. The incarnation of order and industry, he gave neither rest nor indulgence to his colleagues, his subordinates or, indeed, the King.[3] The passion of the reformer which he ceaselessly endeavoured to conduct to the intendants is amply shown by his enormous correspondence.[4] In 1680 he writes:[5] 'Only the excess of work distinguishes men and gives them the illumination and knowledge to acquire merit and consideration all their lives.' A few years afterwards he writes:

'All great things have many reasons why they should not be undertaken, and yet they produce great effects when they are undertaken. If the King had wished to listen to all the reasons against the great things he has done, he would certainly have stopped on the way, and never accomplished anything.'[6]

[1] Babeau, op. cit.; Cheruel, op. cit. [2] Viollet, op. cit., p. 536.

[3] The latter, who boasted that he was the State itself (or so a legend has it), was made the servant of Colbert's will by Colbert's flattery. Phrases like 'Your majesty has told us in two words what the deepest meditation of the cleverest men in the world could invent only in several years', put the sceptre into the hands of the servant.

[4] This appears in full in the *Correspondance Administrative Sous le Règne de Louis XIV* (edited by G. B. Depping, 1850, Paris, 4 vols., especially III and IV) and in excellent selection in Clément, *Histoire de Colbert et de son Administration* (3rd Edn., 1892). I give the references to Clément as this is most accessible.

[5] Op. cit., II, 46. [6] Op. cit., II, 296.

In 1664 Colbert sent a large number of *maîtres des requêtes* to the provinces to draw up reports on the state of the administration, and thus obtained fresh and direct evidence of abuses, especially in financial administration, which had been allowed to flourish by his predecessors in the office of Comptroller of Finance. His reforms do not at this point concern us: one thing alone is important, a tremendous amount of activity was undertaken by the State, and this devolved in the provinces upon the intendants in the first place. He exhorts, advises, praises, scolds the intendants.[1] Hundreds of pages could be filled with injunctions like that in the footnote, all carefully worded and delicately analysed, and all designed to make the intendant feel the power of the great Minister, but more importantly to do his work. When we reflect upon the immense number of public activities which Colbert either established or extended, and that the efficacy of it all depended upon the initiative of the central authority, since this was unwilling to share power with the old local authorities, or quasi-representative assemblies, we can understand what an enormous amount of driving power was needed at the centre, and what minutely obedient instruments were needed at the extremities. Industries like lace, silk and Venetian glass were established or developed, native workmen were prohibited from leaving, and foreign craftsmen were encouraged to enter France, the guilds were entrusted with powers to regulate trade and industry and themselves needed regulation, commerce in the most important native agricultural products was carefully regulated, fleets, arsenals, bridges, roads, and canals were built, mining

[1] Op. cit., II, 177 ff.: 'You did well to get that money sent to the Treasury See that the collectors do their work in good order and accelerate their payments! Find out how much the collectors and the clerks give as a rebate, when advances are made, and at what rate of interest! Don't let the collectors be so persecuted when you have good security that they will pay soon, it is useless to have them lodged in prison. You must find means of getting the money without too much fuss and without killing the goose; it is yours to discover at what point tolerance becomes weakness. Commune X has been impoverished by a hail-storm;—see that the surrounding Communes pay its share of the taxes! Listen to all the complaints *about the inequalities of taxation and do whatever you can to get rid of abuses*; and examine very carefully the expense-accounts of the collectors! You cannot give too much application to penetrate their mysteries, for into these enters much cheating! Find out the worth of a former royal domain that is in your district, but do it without letting anybody know—pretend that it is simple curiosity on your part! Find out how much wood is liable to taxation; you ought to know it as much for yourself as for the "good of the people and the advantage of the King, which are inseparable"' (II, 225). 'Do not write so laconically; you are my cousin, and we are closely related enough for me to tell you that from no other Intendant do I get such short letters; showing so little application and interest. You, too, are a relative of mine, and you seem never to reduce difficulties, but only to make them *greater. Let me say that if you were not my relative I should find prompter means* of withdrawing from the troubles your information gives me—and, for heaven's sake, don't try to do the work all by yourself, but use the knowledge of those accustomed to the matter! Complete the road you undertake! Don't waste money by starting a number and not finishing them! Find which is most important and finish that first!' (II, 133, 134).

was encouraged, forestry was regulated and horse-breeding developed, criminals and vagabonds were unmercifully pursued.

The Qualities of the Intendants. The intendants were the local foci of all this activity. Now it is quite obvious that any such extent of State activity is unrealizable without a large and competent body of officials. This is exactly what France lacked. The intendants were judicially trained officers. They were men who had gone through the legal training of the day. This was exceedingly formalistic and could not be said to prepare young men for an administrative career.[1] It enabled them at the most to know their legal place in a territory closely contested by other lawyers. But it did not follow that legal training had even that effect, for the consummation of this was a judicial office, and as these were purchasable and hereditable, the power to purchase was the real key to entrance upon a legal career, and the politics and administration of the day were reserved mainly to the lawyers.[2] Of these those with influential relatives, or friends at Court or in the Church, or favourites of favourites, male or female, obtained office and promotion by intrigues. As soon as one member of a family acquired office he began to pull every available string for the benefit of his relatives. Even Colbert's brilliant genius was several times shadowed and almost extinguished by men aspiring to the same career; and a man of the ability and noble nature of Olivier D'Ormesson was lost to the service of the State for the very qualities that should have won him the highest office—judicial integrity but exercised against Colbert's ruthless and lethal attack upon his predecessor Fouquet.

This does not mean that patronage always had, or has, bad results, for the King and the Ministers had their own credit to guard. And this is precisely the defect of patronage: when the patrons care little or not at all for their own credit the offices go to the worst, and the most competent keep out of the system or, through discouragement, cease to work. Under Colbert and Louis XIV a modicum of efficiency was maintained: the means being the exceedingly energetic application of these men, and the occasional appointment of very conscientious and able officers.[3] But in the periods of war the machine ran down, not in the sense of doing nothing, but in the sense that what was done was done badly, as the nature of Colbert's scoldings amply shows. The intendants were well fitted to undertake their two elementary duties: to vindicate the authority of the King in the province against

[1] The examinations conducted by the legal corporations were farcical. See e.g. Normand, *La Bourgeoisie française au XVII^e Siècle* (Paris, 1908), p. 65 ff.

[2] The *Journal d'Olivier Lefèvre d'Ormesson* (2 vols., Ed. Chéruel, Paris, 1860) tells this story, and is an invaluable record of politics and administration under Louis XIV. Cf. also the careers of the Ormesson and Molé families in Normand, op. cit., Chap. IV, and that of Colbert and his relatives is equally instructive.

[3] Cf. Charles Godard, *Les Intendants Sous Louis XIV*, Chap. XIV.

the mob of local noble pretenders with feudal or purchased offices, and yet to maintain relations not too unfriendly with the other authorities, who often had to be compelled to forgo feudal claims on the peasantry.[1] Yet not all were competent, without day-by-day instruction, to do the type of work which Colbert and those who followed his *étatiste* principles required of them, and from time to time financial peculation was discovered. What was commended as a policy to increase the material welfare of the people tended to petrify and become a deadening tyranny.[2]

It is clear that the intendants could achieve nothing without the aid of subordinates, and all the minor officers in the employ of the various departments of the Council of State were at their beck and call. Further, the officials, paid and unpaid, of the local authorities, were their servants also. Both classes of officials, as far as we can see, showed neither ability nor willingness. They were recruited in one of three ways: they were either elected (e g. parochial collectors of the revenue) and like the English Overseers of the Poor of the same time were only too anxious to shuffle off their onerous and unpaid duties; or they purchased their office as in the case of most of the central authority's officials, and saw in it only the means of oppression and the extraction of the maximum fees, bribes, and the other profits, while they gave the minimum of service, all the while maintaining an irritating independence of the intendant; or they were appointed by the Crown or the intendant at discretion, which meant, in fact, by the favouritism of families or mistresses. There was constant war between the intendants and the local administrative apparatus, yet without the use of the latter the intendant could not carry out his policy. The maintenance of harmonious relations with the local powers—the Governors, the Courts, the President of the Estates (where there were Estates) and the municipal leaders—therefore became of first importance, and it is not therefore surprising that not only the character of the intendant was important in this regard but that of his wife also! The seventeenth and eighteenth centuries when State and society were being remodelled were exceedingly sensitive about precedence!

Sub-delegates. It was impossible that the intendants should be able to accomplish all their tasks in person, by direct dealings with the various localities and people. They were quite early in their history (about 1640) obliged to appoint *Sub-delegates*;[3] at first for special occasions, later as permanent subordinates for all tasks; primitive means of communication compelled the delegation of work to local agents. The royal authority was curiously displeased with this

[1] Godard, op. cit., p. 424 ff.; and the *Correspondance Administrative* is full of this.

[2] Godard sums up the jurisdiction of the intendants at the end of Louis XIV's reign (p. 440).

[3] Cf. Babeau, op. cit., II, 68 ff.

development. Colbert wrote to the intendants, individually and collectively, to employ sub-delegates as little as possible.[1] It is clear that he was afraid that the full force of the will of the central government would be weakened by the employment of officials drawn largely from the locality. He complains that they will have private interests, affections or hatred which do not march well with the course of justice.[2] And in 1683 the power of the intendant to sub-delegate in civil and criminal matters was restricted, to the great inconvenience of the intendants. But the Crown was obliged to bend to the administrative necessities which it had itself created. The central authority began to treat with the sub-delegates directly when this was expedient, and their expenses were paid by the King. What administrative necessity had initiated, financial necessity completed. In 1704 a sub-delegacy was created by the Crown in every chief town of each administrative district called an *élection*, and the office was purchasable. Until that time the appointments were made at the free discretion of the intendants. As few buyers appeared for the office they were suppressed in 1715. The duties were very vague and were as elastic as the intendant allowed them to be. According to the edict of 1704,[3] they were to receive requests presented to the intendants, to whom they were to send them with their comment, to transmit the orders of the intendant to the head officer of the towns and communes and see that they were carried out, and to help the intendant in the administration of the taxes. They were paid by the intendant and by whatever fees and bribes they could extract. They, like all subordinates in a harsh and autocratic system, suffered the hostility and complaints of the common people; and their petty oppression no doubt deserved it. Their further history is indicated later. Let us add that the increase of State activity and the creation of purchasable offices brought under their immediate superintendence numbers of inspectors of taxes, of manufactures, of customs duties, general purposes, horse-studs, victuals.

There was thus established in the seventeenth century a system firmly under the direction of the central authority and extending practically over the whole territory of France. Its personnel was of very unequal quality, but some of its members were exceedingly capable administrators, and even more than that, men of fine character and genius. The early intendants, sometimes called intendants *de combat*, had the unpleasant but indispensable task of bringing the country into ordered ways, and it is their arbitrary power rather than their personal capacity which is censurable on the democratic criterion used by people like De Tocqueville. The later intendants, as we shall show, wore less and less the aspect of tyrants, and became benevolent

[1] Viollet, op. cit., pp. 552, 553. [2] Clément, *Colbert*, II, 11 and 12.
[3] Marion, *Dictionnaire des Institutions Administratives au 18me siècle*, p. 519.

administrators not seldom in conflict with the central authority for their local sympathies, and sending a stream of reformative suggestions to it. Indeed, men like Daguesseau [1] and Foucault [2] had, already in the late seventeenth century, anticipated the wise and benevolent rule of their successors a century later. But the intendants were the *bête-noire* of critics like Saint-Simon, Vauban, and the Comte de Boulanvilliers.[3] Between the end of the reign of Louis XIV and the Revolution there stretches more than a half-century of administrative history which De Tocqueville has described in *L'Ancien Régime*. De Tocqueville does not spare the system; the full energy of his passionate belief in liberty and decentralization is directed to paint in its darkest shadows.[4] He writes under a régime which every day goes back upon the motives of the Revolution and he sees no sign that his compatriots will offer resistance. That distinguished mind cried, 'Centralization, there is the enemy!' and the form of the cry is *L'Ancien Régime*.

The centralized system had consolidated itself, and the intendants were its instruments. In several famous and eloquent chapters De Tocqueville draws up the catalogue of France's grievances. 'The Intendant was in possession of the whole reality of government.' He quotes the often-quoted remark of the notorious Law to D'Argenson:

> 'Sir, I could never have believed what I saw while I was administering the finances. You ought to know that this kingdom of France is governed by thirty intendants. You have neither parliaments, nor countries, nor Estates, nor governors, I am almost inclined to add, neither King, nor ministers. It is upon thirty Masters of Requests, sent to the provinces, that their happiness or misfortune, their fertility or sterility depend.' [5]

[1] Cf. Marion, op. cit., p. 297, where the character of the Intendant Daguesseau's service is sketched by his son, the great *Chancelier*: 'My father realized, first of all, that an intendant placed between the King and the people must regard himself as the man of the one and the other, and so destined to be the organ of the wishes of the master that he should perhaps be more so of the wishes and prayers of the subjects who cannot address themselves to any but him to obtain a hearing of their miseries.'

[2] Cf. the analysis of the *Memoirs of Nicholas Foucault* in Clément, *Études Financières*, 'Un Intendant de Province sous Louis XIV,' Paris, 1859.

[3] In his *État de la France* Boulanvilliers said: 'Among the miseries of our century none more deserves the compassion of posterity than the administration of the Intendants. The opposition which almost all the inhabitants of the kingdom offered to this novelty was the final effort of French liberty. The people did not understand what intendant meant, but as they were always lovers of the novel, they believed he would be their protector against the nobility: they soon learnt by a much sadder experience that these new magistrates were to be the instruments of their misery.'

[4] Cf. Introduction: 'I hope I have written this book without prejudice, but I do not profess to have written it without passion. No Frenchman should speak of his country and think of his time unmoved. I acknowledge that in studying the old régime of France in each of its parts I have never entirely lost sight of the society of more recent times. I have sought not only to discover the disease of which the patient died, but also the means by which life might have been preserved.' Cf. also Saint-Beuve's *Essay on de Tocqueville*.

[5] I use the full extract from Viollet, op. cit., p. 527, as De Tocqueville's is slightly, but not significantly, reduced.

The volume of work for which they are responsible is enormous and has ludicrous results. They administered the unpopular taxes, principally the *taille*, the capitation tax, and the *vingtièmes*; they administered conscription for the militia, undertook the execution of public works, directed the engineers in the construction of roads, maintained public order with the help of the mounted police, administered poor-relief and the work-houses, promoted agriculture, and supervised all the regulations governing industry. Government had assumed the place of Providence. The results were in part ludicrous and in part tragic. Foolish regulations caused officials to undertake foolish tasks: they entered into the most minute detail, for example, to ensure that cloth was made of the right dimensions and quality while producer and consumer had other wishes entirely. But other effects were more serious; people and officials became accustomed to formalities, delay, over-regulation, and a surplus of reports and statistics. No one could possibly understand or keep all the rules and therefore both officials and population ceased to take them seriously. The localities had experienced the substantial extinction of all rights to self-government, and the centre of power was in Paris; to Paris, therefore, the best talents flocked, further denuding the provinces of spiritual life. The country was in the grip of a rigid and deadening centralization, one, indeed, which so worked upon the habits of men that the Revolution could not finish with it, but had to let it return because there was no other mentality ready to fill the possible vacuum. When the enormous weight of a whole system reposed upon the King and one or two favourites, capable or not, it was inevitable that from time to time the power to make decisions should fall into the hands of the subordinate officials at the centre. Hence the development of what is called 'bureaucracy'.[1]

Corrective to De Tocqueville. As we have seen, this system had grown up in the course of some two hundred years, by a process of struggle followed by continuous and gradual consolidation. But on the eve of the Revolution, indeed, for a quarter of a century before it, changes were in progress which find too little consideration in De

[1] Cf. de Luçay, *op. cit.*, p. 149: 'Carried away by the whirlpool of business, obliged to devote long hours to councils and their daily work with the King, the Secretaries of State could not themselves see everything and often found themselves compelled to abandon both consideration and even decision to the officials placed under their orders. From this time (between 1691–1715) the advent of the bureaucracy really dates.' Cf. Maurepas (*cited Luçay*, pp. 573–5): 'More, the various ministers have accumulated for a century past so much detail in affairs of all kinds that it is impossible for them to attend to them directly. Thence a new kind of intermediary power has grown up between the ministers and the citizens, which is not that of the Commanders nor the intendants of the provinces; it is that of the clerks, persons absolutely unknown to the State, and who, however, speaking and writing in the name of ministers, have like them an absolute, an irresistible power, and are even more than they sheltered from all investigation, since they are much less well known.'

Tocqueville's accounts. In a brilliant study a Russian historian has revealed their nature.[1] For various reasons, the centre now exerted less influence upon its local servants; the chief reasons were the increasing complexity of affairs and the growing independence of the intendants. The former is so comprehensible as not to require explanation, but the latter merits a discussion, for it is at this point that later research so diverges from De Tocqueville's. The intendants became domiciled in the provinces for long periods, twenty years was by no means uncommon, many served for longer, some for upwards of thirty years. Out of sixty-eight intendants who administered France during the reign of Louis XVI, twenty-four served in one place for more than twenty years, thirty-nine for at least ten years, and only eight for less than five years. Men entered their posts in early manhood and remained often till death. What a contrast this was to the short terms of office of the Ministers in Paris, and to the early history of the system! The result was two-fold: the growth of independence *vis-à-vis* the Ministers, and the development of local patriotism. People talked now of the intendant as 'the man of the province'.[2] The intendant became paternally interested in the province, made his peace with the competing powers, represented the special interests of his locality and, besides carrying out the policy of the central authority with every benevolent regard for the well-being of his area, contrived social and economic experiments on their own initiative. As in Germany, office of this kind had become a family career and there are many instances of the succession of office in the same family and the ramification of collateral branches of the family among other offices either in the same or neighbouring provinces or in Paris. There was frequent consultation among intendants directly and not through the intermediary of the central authority: they pooled their experience and lent each other their experts. Their work was made the easier by their accumulation of offices: they remained members of the legal corporations, were members of the *parlements*, and in some cases even the presiding officer of these bodies, and what could not be obtained with facility through one of these professional channels they obtained through another.

Turgot was not an isolated phenomenon in the latter half of the eighteenth century, but merely the more brilliant administrator in a shining constellation of local officials of the *ancien régime*.[3] The intendants were drawn from a class susceptible to the winds of doctrine

[1] Ardascheff, *Les Intendants de Province sous Louis XVI*, Paris, 1909. If there is any bias in this study it is only in the desire to point out that De Tocqueville was insufficiently discriminating about the period at which he placed the full force of despotic centralization. This was before 1760.

[2] Op. cit., p. 81.

[3] Cf. the able biographical and administrative study of *L'Intendant Tourny* (1695–1760), by Michel Lhéritier, 2 vols., Paris, 1920.

which blew so strongly in their time. They were of the class which Ardascheff has very ingeniously named the *noblesse d'État*—that is, the very rich *bourgeoisie* which had acquired high office by its talents and money, and in acquiring office had acquired nobility—the *noblesse de la robe*. Under Louis XIV the officials had been chosen from a poorer and humbler class, they had been the spear-heads of the attack upon the pretensions of the feudal aristocracy; as Saint-Simon called it, *le 'régne de la vile bourgeoisie'*. They were precursors, sometimes the ancestors of this new aristocracy to whom the chief offices of State, the financial and the municipal offices, and the magistracy, were the natural heritage. They were the precursors of the absolute State; the Revolution proclaimed the overthrow of their power but did not accomplish it, and even the era of Parliaments and the career open to the talents is still largely dominated by their social and economic power. From this class came the thousand or so lawyers practising in the *parlements* and the other high courts. They could not enter the *conseil d'état* as *maîtres des requêtes* until after at least six years' service, and this requirement reduced the source of recruitment to between two and three hundred. Other offices, retirements and deaths reduced this number, and a further limitation resulted from the high price of the office of *maîtres des requêtes*. Then not all who were qualified to be members of the Council desired to be. So that the number of maîtres, eighty-four, was the source of the thirty administrators of the provinces.[1]

These men were precisely of that class who formed the staple of the *salons* of the time. We can picture them on their too frequent visits to Paris—for which they were much reprimanded—with Mme Deffand or Mlle de Lespinasse eagerly whispering the latest philosophical novelty or in their provincial towns avidly reading the newest analysis of the human mind, the system of nature and of society. They, like their relatives and friends, were the swallows of the summer of the Enlightenment. Reason, Benevolence and Progress mastered their minds and phrases and began to affect their administrative behaviour; they talked the Rights of Humanity long before the crowd began to enact them. Their administrative habits became milder, their projects savoured less of the study and their own uncontrolled

[1] Necker considered this a serious flaw in the recruitment of the Intendant, as, indeed, it was. Cf. *De l'Administration des Finances de la France*, 3 vols., 1785, III, 266 ff.: 'Until the moment when they are chosen to be intendants, they are only occupied in reporting appeal cases to the Council: this kind of work habituates the mind doubtlessly to a kind of logic; but as it is always between two given points which one is forced to judge, this exercise is not at all an apprenticeship to administration, of which the genius is absolutely different, and the education for which demands rather that one shall attempt at an early age to discover what is not shown to one, to deal with several matters at one and the same time, to master with ease various reports, to classify with order a great diversity of knowledge.'

personal will, improvement became their passion, and 'love of the people' softened the rigour of their aristocratic position.

There is enough evidence, I think, materially to alter the view of the *ancien régime* we have acquired from De Tocqueville. He is too unsparing and too intent upon discovering the causes of the Revolution; even Necker, baffled as he was by the resistances of the régime, admits that there were intendants who needed neither control nor encouragement. De Tocqueville does not record all the facts, but only those which *explain a certain event, nor does he explain why the Revolution did* not come earlier. But he and his successors are at one upon this, that whether or not the despotism was enlightened, it was a despotism; the despotism operated through the intendant and his subordinates; though the intendant mitigated the full weight of centralization yet centralization was very oppressive; though the relations of the intendant and the province became more harmonious and mild, the province desired representative institutions, for whether the intendant was actuated by 'humanity' or not, he was the scion of a caste whose interests and mentality could not but exclude most that was vital to the Third Estate.

Nor was this all. You cannot pretend to govern for the good of the people without finally causing the people to want to govern themselves. Any despotic government which includes the people's good is ultimately excluded by it; and the apologists of benevolent despotism have always found it difficult not to tilt towards the best arguments for a destruction of their model. So that ultimately the school of Rousseau prepared the way for the challenge to autocratic administration, and the Encyclopaedists prepared the way for the rise of *laissez-faire* and the decline of *Étatisme*. It is amusing—though the upshot was tragic—to see the intendants attempting to maintain unsevered in their one bosom two warring souls, each of which they loved with a great passion: the Humanity and Benevolence of their century which impelled them to interfere, and the *laissez-faire* of the Economists, which hissed 'Leave them alone'. Even so extraordinary a governmental genius as that of Turgot could not accept the doctrine that democratic government was better than the system of his day. This wise and philanthropic man could only work as a benevolent autocrat seeking Justice but not sharing its quest with those for whom its discovery was vital.

The public documents of the last few years before the Revolution show the intendants perfectly willing to promote the well-being of their provinces, and becoming more and more able to do so. Learned societies of all kinds—agricultural and other—they sponsored; inventions they encouraged; public works of utility and embellishment they planned and executed. The history of Turgot in the Limousin [1]

[1] A good account is in S. d'Hugues, *Essai sur l'Administration de Turgot dans la généralité de Limoges*, Paris.

is by no means an isolated history, although the character of the man has made it extraordinary. Neither the character nor the ability of the intendants was to blame for the defects of the *ancien régime*; at least, by no means primarily. But the intendants were the whipping-blocks, as are, always and everywhere, the officials of a machine whose purpose and propelling force are disliked. They operated in a society founded upon social injustice, and the autocratic power they represented daily expressed itself, and at times of crisis coercively exerted itself, to maintain the status and material welfare of the aristocracy, the upper *bourgeoisie* and the Church, at the bitter expense of the artisans and peasants. This cannot be done without an elaborate organization of cruelty towards the despoiled. The very voice of God seems to ring in the poignant and cynical cry of the peasant at the news that popular institutions were to be set up: '*Hé quoi! encore de nouvelles mangeries!*'[1] Yes, indeed, you may quiver and take fright! They still mean to eat you. For all government is but a kind of cannibalism, and States differ only in the arrangement of eaters and the eaten.

That cry is the clue to the faulty administration in France before 1789. The intendants, willy-nilly, were the instruments of extortion. They were the tools of the powerful modern State which had taken over the governmental and social obligations of the feudal lords without taking away from these their privileges, or sharing its power with the people who, by taxation and personal labour, maintained that power. On this disparity of financial burden and privileges pivoted all the theories and acts leading to the Revolution.[2] This was at once the spur to reform and the obstacle to it. This in the reign of Louis XVI exalted Ministers in the seats of power and cast them down; filled them with great hopes, for it was a noble task, and ultimately tasted like ashes in the mouth, for the task was beyond their strength.[3] While the intendants administered the systematic despoliation of the people for the benefit of the Court and the *noblesse*, they must be hated by the people.

'The people, charged with taxes, duties, services and obligations of all sorts, complains of the situation and desires a better. . . . It attributes, as is usual in the human mind, all the evils it suffers to the administrators it sees.'[4]

[1] Cf. Renouvin, *Les Assemblés Provinciales de 1787* (Paris, 1921), p. 163.

[2] This is not the place to describe the structure of society. It can be found in Taine, *Les Origines de la France Contemporaine*, Vol. I of which is entirely devoted to this; in De Tocqueville's *Ancien Régime*; and, on the administration of finances, Marion, *Les impôts directs sous l'ancien régime*; and, perhaps, best of all in Necker's reports.

[3] Cf. *Necker Économiste*, by Vacher de Lapouge (Paris, 1914), Chap. IV, and Renouvin is the authority on this.

[4] Renouvin, op. cit., p. 89.

When they set themselves to creative tasks they must be distrusted by the people and hated by the *noblesse*, especially the petrified seigneurs of the countryside. When they attempted to even out the financial burdens by making their administrative practice violate the letter of the law the whole of the privileged classes cursed them for meddling fools.

Provincial Assemblies. From long before the middle of the eighteenth century there had been a strong undercurrent of criticism against the intendants. Aristocratic and democratic thinkers agreed in this, that the intendants should be abolished.[1] By the middle of the eighteenth century even the Court was affected by anti-absolutist views, especially the entourage of the future Louis XVI. In 1778, Provincial Assemblies were actually set up by Necker in two provinces to moderate the centralization of governmental power.[2] In 1787 the system, with some differences, was widely extended. The Assemblies failed, not in their life, but in their conception. For they were conceived as part of the old social order, not as the instruments of a new. As parts of the old social order they were compelled to maintain the privileges on the one side and the burdens on the other. Therefore they could not be given any powers which affected the financial system or the sovereignty of the established authorities.[3] The *Tiers État* was never allowed its *full* voting power, and even if it had been increased to any equality with the combined *noblesse* and clergy, the functions were strictly limited. The elective element of the Assemblies was, therefore, impotent, and the intendants, who were exceedingly embarrassed at the innovation, resumed their ascendancy with little trouble. Indeed, they had been consulted on the constitution of the Assemblies and their report had been quite closely followed. But they felt their position keenly, since all darts were flung at them; conscious of having served the old system well, they were disgusted with the central authority at the creation of a competitor, and this composed of people with whom they had previously been on terms of ruler and ruled. Those among the ruled who were the high aristocracy still scowled and sneered at the intendant, *arriviste*, son or grandson of such. Their *amour-propre* was piqued, and as they saw their field of activity and importance narrowed, they were inclined defiantly to extend it.

Among the vast correspondence between the intendant and the central authority appears this complaint:

'The Commissioner of the King is his representative; he is a piece of money upon which the sovereign stamps the character and value. I do not ask for

[1] Thus the Marquis D'Argenson, *Considérations sur le Gouvernement de la France* composed about 1747, and first published in 1764 (Edn. 1787, *Avertissement*).

[2] Cf. Necker, *Mémoire sur l'établissement des Administrations Provinciales*, 1778 (Edn. Stael, III, 333 ff.), and *de l'Administration des finances*, II, 189 ff.

[3] Cf. also Léonce de Lavergue, *Les Assemblées Provinciales*.

any rank, nor for any prerogative; but to be instructed exactly as to the intentions of the Crown.' [1]

They would not abdicate! Even from the small spheres of power given to the Assemblies.

The Revolutionary Age. Nor did they abdicate until the Revolution abolished the social system of which they were the expression. When legal equality replaced privilege the way was open for representative Assemblies and decentralization; the central authority did not need to be as tyrannous as before, and the two-century-old institution of the intendants died. If it was not difficult, once social forces had shifted, to decree the abolition of the intendants it was not so easy to escape from the tradition which had been created. For a tradition is a motive power in men; what has been sanctioned is a persuasive force, and an expedient ready-made; it saves exertion and thought and secures obedience. The tools had been abolished, but not the spirit which used the tools: centralization itself had not been abolished. Only the undemocratic quality of centralization had succumbed. There was no alternative that could be set against it as a thing efficacious and proven by experience. Theory and aspirations might have provided a substitute, but the Revolution and Napoleon both needed the old method; the Revolution to cause a complete and universal break with the social and political conditions of the past, Napoleon the better to usurp and make all provinces obedient to his will. The notion of *laisser-faire* was ever foreign to the Continental mind, and the French did no more than salute and march past it; yet that notion is essential to the readiness to give and take local self-government. Revolution followed revolution, reaction, reaction; and the impulse of each sudden change was to impress itself over the whole country. No regime had the time and security to grow mellow, and experienced enough to share its power; none but the Third Republic. And then by the middle of the nineteenth century when decentralization had to some extent been practised, and when its value was beginning to be understood, the evolution of science, industry and commerce turned all in favour of centralization, and the second half of the century was occupied in the struggle against the old and the new forces that maintained centralization. Of these more recent developments we must speak later. One blazing truth stands out: centralization can be a democratic as well as an undemocratic device, for the people who make the laws in a democratic state may demand services of government which can only be produced by centralization.

Long experience of centralization and *Étatisme* has bred certain habits of mind in the French. They were observable under the *ancien régime*, they are observable to-day. One was the execration of the central power, shown sometimes in formal criticism, sometimes in

[1] Renouvin, op. cit., p. 137.

cynical and profane jokes. Yet this execration is curiously allied with a certain belief in the power of the central authority to do good. At one moment it is the object of scorn and insults, at another it is the ineluctable machine of well-being. What is, perhaps, more important is the sense that the central power—indeed all governmental power—is something alien to the ordinary citizen; that it is a mere interference; and as such is not to be obeyed unless its laws suit the individual, even when the laws are made by a Parliament representative of the people. Only two generations have gone by since the French lived under a system of government established at the end of the Middle Ages, in which the citizen could hardly ever feel that he was identified with the State. Defective administration is as much a product of unwillingness to obey as incompetent officials.

We have seen that the making of many rules and their evasion was a mark of French government before 1789. Even to this day French financial administration suffers from this habit.

The Caesar-Complex. Lastly, the memory of power of the central executive and its former pretensions has caused French Parliaments to be highly jealous of the modern Executive. Parliaments are everywhere sensitive to the potential encroachments of the Executive, but none so much as the French Parliament. It has been impressed upon them that the central power was once an entirely unrestrained authority, that its acts were arbitrary, that it is still a restive entity animated by the old spirit, and that that old spirit functioned in such wise that a bloody but glorious Revolution could alone expel it. The means is thus identified with the end; and though the end was the real vice, it has the vicarious force of causing hostility to the means. It is true, too, that the modern Parliamentarian is hostile to centralization for other reasons: but history also has a great deal to do with it. The ideals which caused the downfall of centralization equally gave birth to the representatives of the people. At every point these two, Parliamentarian and Official, find themselves in contrast. It is a sheer reaction from an historical situation; one of those undue reactions of which the history of government is almost entirely composed: an unfortunate quality of human behaviour but one which human beings, who live by exaggeration, will take centuries to grow out of; on a large scale it is what the uncontrolled reflex is in simpler behaviour. This Parliamentary consciousness of a *point d'honneur* has many secondary effects, the special discussion of which will be found in other chapters.

The Venality of Offices. The centralized methods of the *ancien régime* might have been supportable by the country if the officials had been competent, if the career at least had been open to the talents. The career was not open to the talents and very little heed was given to the problem of competence. This is a very striking difference from

Prussia, and the advent of Revolution in France and the slow progression from autocracy to constitutionalism in Germany are in part direct effects of the difference in the quality of their respective bureaucracies.

In France until the Revolution almost every office, central and local, excepting the dozen or so highest offices in the kingdom, were attainable only by private purchase, gift or inheritance. All public offices, that is, were a species of private property, and a voluminous jurisprudence governed their transmission. This jurisprudence is at pains to explain that the offices which were vendible and hereditable were of a twofold nature: they were at once a property and a public function. Anybody, then, who desired to acquire an office had to purchase the property from the owner and be installed in the function. The latter gave the Crown the opportunity of demanding guarantees of competence, but in fact the Crown and its officers through whose registers the transaction and the installation passed did not demand such guarantees: they were gallantly content with fees, bribes, and other favours personal or procured. Not every one with the price of an office was legally entitled to it, but, in practice, every one obtained it at some price. Ability, however, unsupported by money or family, was almost certain of exclusion from public office. The system, in short, was venality tempered by favouritism.[1]

Venality began in judicial offices, was extended to financial and other officials, and in 1680 was extended to municipal officials. By the time of the Revolution there were 300,000 offices of this kind, equivalent, at a guess, to the number of all officials, central and local: that is, the judiciary, central and local (all the members of the bench and bar of the *Parlements*), the intendants, the financial, road, forestry, postal and customs officials, the queerly named officials to which the protection and regulation of industry and commerce had given rise: gaugers of wine, computers of hay, salt salesmen, coal controllers, sealing-wax warmers, measurers of cloth, silk, judges of leather, etc.—many, indeed, being quite private employments—and the mayors, lieutenants of mayors, and police.[2]

What was the history of this singular institution? It was little more than a fiscal expedient adopted by impecunious Kings and Ministers, and so easy a means of raising money that once it was begun its evils were never for long obstacles to its extension. Just as some modern countries when hard pressed inflated the currency as an indirect method of taxation, so the number of offices of finance was inflated and sold, the revenue and the commission from their sale

[1] This is described and analysed in Louis-Lucas, *Étude sur la Vénalité des charges et fonctions publiques depuis l'antiquité romaine jusqu'à nos jours*, 2 vols., Paris, 1883. Vol. II deals with the period from the Middle Ages to 1816.

[2] Louis-Lucas, op. cit., II, 30, footnote.

being afterwards paid for by the people at large who were taxed to pay the salaries. The practice had begun as an occasional and unwelcome expedient in the fourteenth century. But in Louis XII's wars with Italy, financial pressure compelled a large-scale operation of this kind: the exception now became the rule.[1]

Prices rose, but there was a frantic buying. Ministers made the most of their financial discovery. As it soon became too difficult to invent new offices, the old ones were doubled or trebled—that is, divided up among several holders, who exercised their functions in rotation, or did what the seventeenth and eighteenth centuries were so fond of doing, employed a humble subordinate to carry them out. In vain did the best minds of the seventeenth and eighteenth centuries fulminate against the system: Kings and Ministers even agreed with these critics. But who could neglect what Loyseau[2] called 'a gift of manna which never ceased, a source without end, a fountain which, although it flowed daily, could never be exhausted'? Various attempts have been made to account for the eagerness to buy these offices. Loyseau puts it down to ambition which had engendered *archomania*, or the mania for office, which caused people to hurry to obtain them in proportion as they increased in number. Impossible, he remarks, to create them too fast; for as le Sage says, 'The number of fools is infinite.' In Loyseau's day a common proverb was 'that there are always more fools than situations!' M. Lavisse, a historian of the highest reputation, makes this comment:

'We love tranquillity, regularity of life, mornings which resemble eventide, modest competence, the exercise of a certain authority, precedence, the signs of some distinction. All this was given by office, as the public service and political office, which are so much sought for, give it to-day.'[3]

[1] In 1522 a special department was created called the *Bureau des Parties Casuelles*, where the purchase price was paid—it was, as a famous and witty jurist put it, a 'shop for this novel merchandise' (Loyseau, *Traité des Offices*). A solid foundation had been laid. The *États-Generaux* had for more than a century remonstrated against the practice, and in 1576, the Three Orders and particularly the Third Estate complained that apart from the fact that 'the power of well and sanely judging is a gift of God and of the Holy Ghost, which ought not to be bought or sold', this practice had already resulted in ambition, venality, ignorance, juvenility, neglected study—a complaint that was to be heard without cessation until 1789 (cf. Picot, op. cit., *passim*; and Normand, op. cit., p. 30). The final touch was given to this system in 1604. Until then offices had been sold only for the lifetime of the purchaser; heredity was a pure favour of the Crown, though sales before death often occurred. Henry IV wanted money. An inheritable would fetch more than a non-inheritable property. Hereditary disposal was established. All such offices were required to pay annually a tax equal to one-sixtieth the price; the tax was sometimes called the *disette annuelle*, more commonly, however, the *Paulette*, from the fact that the scheme had been invented by Paulet, secretary of the King's chamber, a well-known, ingenious financier. The amount of the tax and the number of years for which it was to be paid was not settled once and for all in 1604; the Crown reserved the right to change these as 'public' occasion demanded. And there were many variations of the amount: the term was—always.

[2] *Traité des Offices*, Liv. III, Chap. I.

[3] *Histoire de France*, Vol. VII, 1st Part, p. 368.

The legend in the margin says, *Habitude Nationale.* M. Normand fastens upon vanity as the motive of the purchase of office, and he enlarges upon this:

'There is above all the wish to shine, to dazzle, to dominate one's neighbour or friend, to handle a portion even if infinitesimal of power, to be clothed in a sacred character not possessed by simple mortals. Vanity, the fear of taking risks, the fear of compromising a future laboriously acquired, the horror of a risk recurring every day, the insufficiency of the will for struggle, the superstitious respect of public service, the morbid love of honorific distinction, of costume, a ribbon or stripes, these are the causes which make of the French a race of civil servants and which developed in the *bourgeoisie* the mania of office.'[1]

Whether these were the springs of human action in the seventeenth and eighteenth centuries we shall never be able to tell, but they are true of contemporary France.

Offices were sought, then, with a frenzied energy, and they were created with cynicism. Desmarets, one of Louis XIV's Comptroller-Generals, had proposed to the King the establishment of some quite futile offices, and the latter asked, who would ever consent to buy such situations? 'Your Majesty', replied Desmarets, 'is forgetting one of the most splendid of the prerogatives of the Kings of France—that when the King creates a job, God immediately creates an idiot to buy it.'[2]

The effects upon the administration of France were mixed, but the bad easily outweighed the good. No regard was had to competence in the vast majority of the cases. The law provided for an inquisition into the capacity of the candidate which was supposed to have reference to his character, his age, and 'sufficiency', that is, in the case of officers needing a legal training, legal knowledge, and in the case of the financial officials, of their ability to cover any loss. All these things were neglected. The Legal Companies examined the legal officers: it was a farcical procedure. Only one rule of exclusion was practised: orthodoxy to the Catholic, Apostolic and Roman faith. In the offices nearest to the King, capacity as he or his mistresses judged it was important, and it sometimes occurred that the King would find the means for the purchase of an office. A vast mass of talent was thus excluded, while there was no regulation of entry other than ability to purchase. The numbers of officials bore no scientific relationship to the amount and kind of work to be done; there were too many as a rule and they often held office for only a short time. It was impossible for the Crown to exert any effective pressure upon them through a hierarchy, since each having purchased his office stood in a kind of independence to those above him. None of the devices which the nineteenth and twentieth centuries have found absolutely indispensable

[1] Op. cit., p. 43. [2] Louis-Lucas, op. cit., p. 30, footnote.

to the maintenance of an efficient administrative service could possibly come into being in such a system. There was an untrained, unregulated and uncontrolled mass of people, to whom, above all, the function was a private property to be used as a means of personal power and profit by fees and bribes. The *Pot-de-Vin* is written large all over the history of France.

This system suffered from the same fault which private industry and commerce of the nineteenth century and of our own day exhibit: services were rendered unequally—the best to those who could afford to pay for them. The literature of those centuries is full of sarcastic and mordant criticism of this 'gangrène', as Saint-Simon called it.[1] La Bruyère says[2]:

'Every profession has its apprenticeship, and in progressing from the smallest duties to the greater, one observes in all a time of practice and exercise which prepares you for work where mistakes are of no consequence, and, on the contrary, leads to perfection. Even war, which seems never to be born or have duration excepting in confusion and disorder, has its precepts; you do not massacre each other in platoons and troops in open country without having learnt how to do it, and the killing is there done methodically. There is the school of war: where is the school of the magistrate? Usage, laws, customs there are; where is the time, and a long enough time, in which to digest them and to learn from them? The trials and the apprenticeship of a young adolescent who passes from the teacher's rod to the purple, and whom a payment made a judge, is to decide, in sovereignty, the lives and fortunes of men.'

Montaigne, whose father bought him a councillorship at the age of twenty-three, said:

'There is nothing more barbarous than to see a nation where, by legitimate custom, the function of judging was sold, where judgement was bought for cash down, and where justice was refused to those who could not pay. . . .'[3]

Montesquieu, who entered the magistracy of Guienne in this way, at the age of twenty-five, has an amusing passage in his *Persian Letters*.[4]

'Sir!' says the magistrate to Rica the Persian, 'I have no study. When I took this post, lacking the money to pay for it, I sold my library. Nor do I regret it. . . . We have living books, the advocates: they work for us, and take upon themselves the task of instructing us.'

This was not Montesquieu's final judgement on this subject, as we shall soon see. This was the time, too, which gave birth to Beaumarchais' classic quip: 'A mathematician was needed, but a dancer was appointed!'

The venality of offices gave rise to yet another evil. It encouraged the formation of an official caste. On the face of it this appears

[1] For many examples see Normand, op. cit., Chap. VI
[2] *Caractères*, De quelques usages, 1688 (Hachette, p. 244).
[3] Clément, *Études Financières*, p. 13—'Montaigne Citoyen'.
[4] No. LXVIII, written 1711.

unexpected since money could always penetrate into the phalanx of official positions, but, in fact, fortune goes very largely by bequest within families and one generation which possesses privileges is always in a good position to come upon opportunities for its children. The office-holders thus became a caste ringed round by money and privileges. Within the caste there were quarrels about status, and precedence, and rather rigid rules about who were and who were not marriageable; offices were dowries and the money wherewith to purchase them inducements to marry the plain—but the caste stood four-square against interlopers. The whole body of office-holders was divisible into four classes according to the quality of ennoblement and privileges attaching to the office: (1) The highest and hereditary nobility with its exemptions from taxation, was conferred upon the most important officers—the immediate advisers of the Crown and its governors and lieutenants in the provinces; (2) a second category (councillors of the *Parlements* and other Courts of Justice, and the high accounting officers) obtained simple ennoblement which did not pass to descendants unless the officer died while in possession of his office or had not resigned it until after twenty years of possession and service; (3) a lower category of offices conferred personal nobility; these gave noble pre-eminence but not nobility, and were not transmissible; (4) lastly, there were offices which did not confer nobility of any kind, but only some of the immunities and exemptions enjoyed by the nobles—supplements, virtually, to their salary, such as exemption from the *taille*, of the *tutelle*, from collectorship of the *taille*, etc.

All this nobility and semi-nobility felt themselves part of a class with interests and aspirations other than the rest of the people.

'Once', says De Tocqueville, 'a person had surmounted the barrier which separated the aristocracy from the *bourgeoisie*, he was separated from the past, which seemed onerous. Those who were ennobled were even more arrogant than the nobles of long date. . . . Every newly ennobled person did nothing more than augment the parasite class which lived at the expense of the rest of the nation.'

The result was administratively bad. The old nobility—the *noblesse d'epée*—was in constant bad humour and conflict with the *noblesse de robe* or the *noblesse d'état* as they have been more cleverly named. Part of the difficulties of the intendants arose out of this jealousy which prejudiced proper co-operation. A corporative spirit grew up which made this class resist reforms and caused the higher officials to protect the lower from punishment, for 'short, medium or long, the robe covered and set apart a *gens togata*, which much more nearly constituted an "order" than the nobility'.[1] Two other effects were disastrous: the people could not but feel that this caste had nothing to do with them except to exploit them, and was therefore to be

[1] Lavisse, op. cit., p. 361.

obeyed only in so far as coercion was inescapable; and a continuous temptation existed to those with the means to step into the official class and there seek distinction.

There are those, however, who can find something good in the worst institution, and the stream of comments on venality has left a certain deposit. The first is that it enabled the Third Estate to acquire office,[1] whereas, presumably, without such a mode of recruitment the public services would have been exclusively occupied by the old nobility and their nominees. The parents of the Third Estate gave their children a good literary education in the hope that they might one day occupy high office. Secondly, the offices were taken out of the sphere of politics which, until 1789, were rotten with religious and factional intrigue. Purchase and heredity contributed to the establishment of families in whom professional traditions of science and honour were engendered and maintained and this was far preferable to appointment by Court favouritism. A story tells how, during the two years when venality was suppressed (1618–20), 'the first offices vacant were given to valets and jockeys, and some were insolent enough to break into the room in order to see whether an officer, lying ill, had already expired'.[2] Finally, it was argued that venality produced the non-removability and official independence of legal officers—an extremely important gain at a time when the monarchy was moulding everything, provinces, municipalities, to its purposes—it was a refuge from the rule of the arbitrary.

It was apparently on this ground that Montesquieu, in his *Esprit des Lois*, finally favoured venality.

'But in monarchies this custom is not at all improper, by reason it is an inducement to engage in that as a family employment which would not be undertaken through a motive of virtue; it fixes likewise every one in his duty, and renders the several orders of the kingdom most permanent. . . . Plato cannot bear with this venality[3]: "This is exactly", says he, "as if a person were to be made a mariner or pilot of a ship for his money. Is it possible that this rule should be bad in every other employment of life, and hold good only in the administration of a republic?" But Plato speaks of a republic founded on virtue, but we of a monarchy. Now, in monarchies (where, though there were no such things as a regular sale of public offices, still the indigence and avidity of the courtier would equally prompt him to expose them to sale) chance will furnish better subjects than the prince's choice. In short, the method of attaining to honours through riches inspires and cherishes industry, a thing extremely wanting in this kind of government.'

To this Voltaire in a note exclaims:

'Let us lament that Montesquieu has defamed his work by such paradoxes! But we can forgive him: his uncle purchased the office of President in the

[1] Thierry, *Essai sur l'histoire de la formation et des progrès du Tiers État*, Chaps. IV and VII.

[2] Louis-Lucas, op. cit., II, 69.

[3] Book V, Chap. 19.

country and left it to him. After all, we find the man. No one of us is without our weak point.'

All this may have been true, but the evil heavily outweighed the good. The contemporary verdict was one of painful derision. 'We smile at such follies now,' said Voltaire, speaking of the reign of Louis XIV, 'but they were wept for then.'[1] Necker, whose policy of reform failed before the vast obstruction of abuses, said:

'The gentlemen of the Robe, believe, too easily, that the capacity for administration is their exclusive appanage; but this capacity, like all others, belongs neither to the coat, the mantle, nor the dressing of the hair; it is a gift of nature which education, study, and experience improve, and which the habit of reflection perfects.'[2]

There were occasionally serious suggestions to abolish the system—mainly under Colbert—but financial pressure and the question of compensation defeated all projects. The Revolution made a complete and indiscriminate suppression of the institution, and it required 400 decrees to accomplish this.

* * * * * * *

Favouritism. Government abhors a vacuum, and when the laws deliberately create such a vacuum by a revolutionary break a new principle must be set up. The Declaration of Rights of 1791 established a new principle. Article 4 says:

'All citizens being equal before it (the Law), are equally admissible to all public dignities, situations, and offices, according to their capacity, and without any other distinction than that of their virtues and their talents.'

The vacuum is, however, not properly filled until a method of measuring and choosing 'virtues and talents' has been devised and put into operation. Such a method ought to be determined by a calm and mature consideration of the nature of the State, considered not as a static entity whose life-history has ended, but as a dynamic condition. But the practical conditions of a Revolutionary period do not allow of such foresighted and wholesale plans: there are urgent and immediate contingencies upon whose solution hangs life or death. The vacuum is, therefore, filled by a rush of that very spirit which

[1] Cf. D'Argenson, op. cit., p. 161 ff.: 'The removability of the officer who does not push prevarication to its extreme, is no longer in the hands of the King; he must be tried, and that by the Company to which the accused belongs. The interest of the Companies has developed itself much more as independence, than as zeal for the public good. Hence few faults are punished, few abuses are rectified, whether the crimes and errors of those who should show an example, whether the crimes vicious in their social consequences. Hence one sees on all sides negligence and infidelity in the public thing: in one word, all the evil effects which follow from a vicious quality in the origin and the institution.'

[2] Cf. Necker, *De l'Administration des Finances de la France* (Edn. 1785), II, 196.

made a Revolution.[1] It is natural that the Revolutionist shall judge virtue and talent roughly and readily as whether you are for or against him: indeed, in a Revolution people choose themselves. Also in a counter-Revolution. And as Revolution and counter-Revolution succeeded each other at intervals until 1870 it is not surprising that no careful attention was paid to the problem of recruitment, and that Republics and Empires and Consulates and Kingdoms relapsed not into systematic venality but into systematic favouritism. What Richelieu had long ago feared had now come to pass: the abolition of venality had caused the distribution of public offices to 'depend upon the favour and intrigue of those who are most powerful around the sovereigns . . . and was always accompanied by great inconveniences'.[2] By 'great inconveniences' Richelieu meant that great nobles had won themselves political power by dispensing favours. So did the factions and the parties in French political life after 1789. They were unrestrained by any fine tradition to the contrary. Favouritism chased Venality out of France and reigned in its stead until recent years. The general attitude is exceedingly well exemplified in the words of a French writer of the year 1812—in what is, perhaps, the first book bearing the title *Principles of Public Administration*.[3] Anxious to secure the creation of a Code of Administrative Law *similar to that already established for Civil Law by Napoleon*, he discusses the subject in all its wide extent with an understanding and grasp always talented and sometimes near genius. Several chapters are devoted to the qualities of the Administrator, and as described they are as necessary as they are rare.[4] Yet, when the writer is treating of the appointment of the personnel he has nothing more to suggest than simple Nomination by those in power:[5]

'The civil servant (*fonctionnaire public*) is an essential part of the organic motivation of the State, since one could not conceive of laws without agents specially charged with their execution, any more than one could conceive of movement without the presence of bodies which procure it . . . all civil servants are and ought to be subject to nomination by the prince, because they are the direct agents of execution of the laws and the management of public affairs, and because, he, being the guarantor of their management, choice ought *to be abandoned to him. Otherwise, one would be desiring effects without* admitting their necessary causes, since those causes would not produce them. Further, these civil servants participate, by the nature of their functions, in the government of the State since, without them, the prince would not be able to act. In order to act, it is necessary that he should have in his power the

[1] Taine's metaphor is different, *Regime Moderne*, I, 194: 'By an amputation, radical and entire, extraordinary, and to which history does not measure an equal case, with the temerity of the theorist and the brutality of the *carabin*, the legislator has extirpated the old institution as far as he was able. . . .'

[2] *Testament Politique*, Chap. IV, Sect. I.

[3] *Principes d'Administration Publique*, by Charles-Jean Bonnin, Paris, 1812, 3rd Edn.

[4] Vol. II, Bk. XII.

[5] I, pp. 151 and 152.

means of action, and that these means depend upon his discretion in the absence of which his moral responsibility would be nil, his action paralysed, because he would not have at his disposition the knowledge of men, place and time.'

And as nomination was abandoned to the will of the prince, so was promotion and dismissal.

This was, indeed, a Napoleonic solution, and the book is evidently written under the inspiration of that fierce genius's rule. Many years elapsed before the creation of an objective and public test of quality was sought for, decades went by before they were decreed, and only in the last generation have such tests become effective.

Survey. The French have, therefore, an experience of administration which has made them unfriendly towards it. When their Kings were administratively active they suffered from his assistants; when those Kings were libertines and occupied themselves in war or court intrigues the people paid the price of a machine which they detested. Modern research makes possible this conjecture, that France might have been better administered if the mistresses of the King, women like de Maintenon and de Pompadour, had been allowed to rule unencumbered by their masters—they were infinitely more capable! At a time when Prussia was rising to European importance by the forceful and able administration of a succession of particularly brilliant monarchs, the administration of France was systematically ruined and its name and actions delivered over to scandal and mockery by Kings of weak will, debauched lives and a juvenile taste for the glories of war. Thus did the accident of birth, and the Nature-given geographical situation, which produced expensive wars, conspire with human nature to erect a centralized and venal polity.

The shapes which the central administrative departments successively took are not of much importance; as everywhere else they began as an amalgam, then were sorted out first by area and later by cognate services and swayed between control by single secretaries of state and boards.[1] Higher, perhaps, than in other countries was the importance of Comptroller-General of Finances, and this was because the finances were in a chronically pathological state and everything was subordinated to the requisition of a large revenue.[2] Ministers came and went in remarkably quick succession.[3] In the story of Necker's administration and downfall, and in that of Turgot, the whole natural history of the *ancien régime* is written. There seemed neither energy nor stability at the centre, and by the middle

[1] Cf. Viollet, op. cit., and de Luçay, op. cit.

[2] Cf. Necker, *De l'Administration des finances*; and de Mareé, *Le Contrôle des Finances*, Paris, Vol. 2, 1928, Chap. XII.

[3] In the reign of Louis XIV the controllers served an average of eleven years each; in Louis XV's regency five years, in his own reign three years and Louis XVI's reign of eighteen years, an average of one and three-quarter years.

of the eighteenth century it began to give way to criticisms and petty shocks as never before. For it was bound up with an unjust society founded on privilege and repression and the people responded to the cry of 'Social Justice' with so passionate a shout that the whole fabric fell. In truth, when we think of the long years during which social abuses held sway, we realize that to expect an effective challenge to them is as vain as that machine-guns could come to the help of a beleaguered army in the fifteenth century: mankind had then not yet invented the medium through which the appropriate power could issue. Nor is it possible for society suddenly to lift itself up and away from its own foundations.

The organization of the nineteenth century was not, then, written on an entirely clean sheet. The gullies could still be seen in spite of attempts at erasure, and the pencil was apt to slip into the ancient grooves; or their appearance would so terrify the legislators that they would write what a calmer mood could not commend. Of these things later chapters will tell.

CHAPTER XXX

RECRUITMENT IN THE NINETEENTH AND TWENTIETH CENTURIES: GERMANY

INEXORABLY the spiritual and material conditions of nineteenth-century civilization began to affect the recruitment of the public services. Inexorably, but only gradually, and with much opposition from obsolescent ideals and vested social interests. An extraordinary break came round about 1875: the countries in which modern industry and the modern spirit had come to their most vigorous and self-conscious efflorescence then made sudden haste to renew their civil services, for the logic of efficiency was irresistible. Within the general path trodden by all, each country moved at its own speed and its own manner, governed by its history and its hoped-for destiny. In the chapters which follow we continue to sketch the general development of the administrative services with special attention to the methods of recruitment. The vastness of the subject and the fact that slightly different lines of evolution were taken by different classes of the Civil Services makes some sort of selection necessary. The task of selecting is easily accomplished here, for we are primarily interested in the branch of the Civil Service which shares in governing—that is, the higher administrative class. It is in this respect that modern states show differences, and characteristic differences; and that the evolution of the modern State is best observable. While, therefore, tracing the general assault upon patronage and the State's adjustment of its machinery to its purposes, we shall (1) deal with the higher services first, then (2) compare them and try to estimate the significance of their development and ultimate results, and (3) indicate, but very briefly, the solutions adopted for the subordinate classes.

Germany. In Germany, after the reforms of the French Revolutionary period, there followed a time of conservatism and consolidation. In old Prussia the Civil Service had been an exceedingly active institution engaged in executing the directions of the Cameralist thinkers, that is, in devising and applying measures for the well-being of the people. The Civil Service was a nation-wide and continuously operative economic institution. Its training had been adapted to its functions. But between 1815 and the last quarter of

the nineteenth century a number of new conditions caused a very vital variation of the mode of recruitment. A vast mass of legislation, as distinct from administration, was required, to meet social and economic needs. The State was renewing itself, and the duties and rights it was creating to accomplish this were often in the direction of freeing industry and commerce from its regulation. While, therefore, it was not adding to its administrative work it was making law, and it felt the strong need for civil servants with a good *legal* training, and, moreover, a training in private law. Again, since administrative law and its procedure were being sedulously developed, great importance was once more attached to legal training. Further, the constitutional struggles had for their object the legal restraint of arbitrary officialdom, and Parliament saw in a legal training of officials a good means of teaching them a practical respect for law. Nor were the individualists in this very temperate hey-day of German *laissez-faire* unready to secure limitations upon the activity of the administrative official similar to those of the judge.

Until 1879, therefore, the old practical and Cameralistic preparation suffered continual modification which favoured legal studies. The authentic note of the eighteenth century is still heard fully in the Prussian Instruction of 1808. Candidates are expected to have thoroughly studied political science (*Polizeiwissenschaft*), technology, statistics, experimental physics and chemistry, botany and agricultural economy, and have had the opportunity of acquiring practical knowledge of the most important trades, especially of agricultural. They were no longer required to have worked in one of the Domain Administrations. Their examination was written and oral and they were accepted only if 'they combined thorough theory in the required sciences with a sound, well-exercised judgement'.[1] In 1817 a change is already observable.[2] Besides the preparation in the usual branches of knowledge, in languages ancient and modern, in history and mathematics, there is required *thorough knowledge of the law*, at least some practical knowledge of agriculture or some other chief industry, and as far as possible practical work as 'auscultator' in the Courts. The effect was not to put law into the foreground, but it was certainly to introduce a competing element and a relative depreciation of the position of the Social Sciences. However, the decisive change in emphasis did not come until 1846 when practice in the Law Courts became the rule and in agriculture or industry the exception. The chief requirement now became practice in the Law Courts and the passage of the second examination in law for entrance to the superior courts. The candidate was then required also to pass a special

[1] Clemens von Delbrück, *Die Ausbildung für den höheren Verwaltungsdienst in Preuszen, Jena, 1917*, p. 6.
[2] Ibid., p. 7.

examination in order to become Referendar in the administrative service. This consisted of an oral examination in the Social Sciences, but all that was now required of the Cameralistic and Agricultural sciences was 'at least general acquaintance' therewith. Finally, there came the decisive 'second examination' for the attainment of a permanent position as *Regierungsassessor*. This examination was written and oral; the former consisted of three theses, one dealing with a subject of political science, another of administration, and the third of finance, the latter two being of a more practical nature.

By 1846, the predominance of Legal Studies was firmly established, and the final break had been made with the eighteenth century.[1] Most interesting is the downfall of the importance of agriculture. It was the perfect symbol as well as the result of the new ways men had discovered of winning a livelihood- an abrupt, swift and unrelaxing deviation from thousand-year-old habits. As interesting, too, is the cessation of practical work in agriculture and industry as a preparation for public service. It betokened the conscious withdrawal of the State from positive economic and social activity. The Social Sciences ceased to have their old importance as the foundation of a civil servant's training, but worse still, their cleavage from actual practice caused them to become excursions in the literary history of theories. They became less a scientific preparation than an exercise of memory,[2] and the universal weed which forms upon the soil of circumscribed and theoretic studies, the 'coach' or 'crammer' appears, without resort whereto it was now almost impossible to pass the examination.[3] In 1866 it became necessary to reconsider the Regulation, partly owing to public and parliamentary criticism but more particularly owing to the extension of Prussian rule. All candidates then ready were examined under the terms of the Regulation of 1846, which then ceased to have practical effect. It was superseded, in fact, though not formally, by the law of 1869,[4] which regulated entry into the higher judicial service, by abolishing the Intermediate Law Examination at the Universities, and setting up only two examinations, the first, the University Law Examination taken after at least three years' study, and the second, the great State Examination, taken after at least four years of preparatory service. Until 1879, administrative officials were recruited from the judicial assessors trained in this way. These judicial officials might have received a one-year's training in an administrative department as part of their four years' preparatory service: this was the inten-

[1] Von Delbruck, op. cit., p. 8 ff.

[2] Cf. von Delbruck, op. cit., p. 11. The author speaks from experience.

[3] Cf. also Hellmut von Gerlach, *Meine Erlebnisse in der Preussischen Verwaltung* (1919); though this speaks of preparation for the service on the basis of a later Legislative, that of 1879.

[4] 6 May 1869; *G.-S.*, p. 656.

tion of the Government, but the Prussian Parliament rejected the proposal as it feared the undue influence of the Executive.[1]

We now come to a period in which the position of legal studies is consolidated, but no sooner is it consolidated than parliamentary and public critics are compelled to criticize the efficacy of legal studies as a preparation for the administrative work of the modern State. Moreover, University teachers of law became thoroughly dissatisfied with the nature of the curriculum since they realized that it may have serious effects upon the efficiency of the Service. A very lively controversy therefore begins, as to the scope and method of legal studies.

For Germany was now full in the strong current of industrial civilization and the sense of State activity which had weakened a little between 1815 and 1870, but had never fundamentally suffered, now not only recovered its old strength but went beyond it in scope and energetic persistence. This the higher officials themselves recognized, and their experience had taught them that the best administrative officials were to be obtained by a special training in which the study of Economics and Finance at the Universities and the acquisition of exact knowledge of the conditions of public life and administrative law and practice during preparatory service were of equal and high importance. A Government measure put before the Prussian Parliament in 1874 acknowledged the necessity of a special preparation for higher administrative officials.[2] It admitted that the law of 1869 promoted only the study of law and that the entrant to the Service could not obtain a knowledge of administrative institutions and administrative law at first hand: the more, in fact, that he devoted himself to law, the less would he be able harmoniously to relate written law and the practical necessities of life. A thorough knowledge of the indispensable sciences of economics and finance could only be obtained by their early, long and serious study, and, as an adjunct of legal studies, would be entirely insufficient. The report of the Parliamentary Commission which examined the Government's project broadly agreed with it on the need for a formal training, not so overwhelmingly juristic, but differed respecting the mode in which the training could best be secured. The Commission suggested that the examination in Political Science and Economics for the higher administrative service should be combined with the law examination at the end of the University course, while the Government's proposal was to examine on these subjects only at the termination of the candidate's judicial preparatory service. The latter suggestion obviously maintained the predominance of law by deferring

[1] Cf. Friedrich von Schwerin, *Die Befähigung zum höheren Verwaltungsdienst* (1908), p. 5.

[2] Schwerin, op. cit., p. 6.

acquaintance with other subjects to a late time, when the discipline of law would in all probability have made the mind wellnigh impervious to the intended effects of the suggested studies. Further, the Commission suggested the application of these proposals to the chief presiding officials of the local government areas [1] as well as their immediate subordinates, who alone were affected by the Government proposals, and recommended that in the Ministries of the Interior and Finance only persons who had acquired the qualifications for the higher judicial service should be appointed.

Law *v.* The Social Sciences. The project and the Report were not debated, but between 1874 and 1879 several more attempts were made to settle the question, the same issues recurring, namely, the respective parts of law and the social sciences, not only in training for the higher administrative services, but also in the judicial service, since there were parliamentarians who demanded that the social sciences should form part of the judge's training. After prolonged debate, open and occult, the Prussian Diet, the House of Peers and the Government arrived at a compromise.[2] The principal points with which we are here concerned are the position to which the new regulations applied, and the nature of those regulations as the mode of preparation for the Service. The regulations related to Divisional Directors and members of a Government District, and the higher administrative officials adjoined to the Over-Presidents and Government-District Presidents, with the exception of Justiciars and the technical officials. It may seem strange to the English reader that the regulations were made to concern what appear to be primarily local officials, but, indeed, such a mixture of central and local government powers are exercised by the authorities we have named that, in the present context, and in almost every other, they are to be regarded as departments of the central authority operating outside Berlin for a limited part of the territory. In any case they were until 1879 and they are still the first office held by aspirants to the higher administrative departments, and thence, after a preparatory period, they may find themselves translated by way of promotion to the central departments. The regulations were not made to apply to Presidents of the Government Districts or the Over-Presidents of the Provinces, or Ministers.

The rules relating to training are of great importance since they persisted until 1906, and were until then the object of controversy, and after certain reforms in 1906 continued to dominate conditions until the Revolution of 1918. The main provisions of the law were as follows: The qualification for entry into the higher administrative

[1] That is to Presidents and Divisional Chiefs of the *Regierungen*; *Landräte*, *Kreis und Amtshauptmanner*, and *Oberamtmänner*.

[2] Law of 11 March 1879, and Regulations, 29 May 1879.

service is at least a three-year University course in Law and Political Science; and the passage of two examinations. The first examination was the legal examination as prescribed in the law of 1869. The second, the State Examination, was to take place before the 'Examination Commission for Higher Administrative Officials'. The second examination was preceded by a preparatory period of two years in the Courts and at least two years in the Administrative Departments. Preparatory service took place in local government, urban and rural. The subject-matter of the second examination was Prussian public and private law, and economics and public finance. The examination was written and oral—the written part consisted of two theses—six weeks, or a little longer, being allowed for the completion of each.

Very little had been accomplished by this law to meet the nature of the claims which society was beginning to make upon the higher branches of the Civil Service. Had it not been for the Representative Assembly's fears, a separate examination might have been created for them based upon the Social Sciences, but in the existing state of politics the Assembly could only credit the Government with the intention of using such an examination to reject 'undesirable elements'.[1] The result was that in practice law still retained a favoured position. At the examinations very little emphasis was laid upon knowledge other than that which was directly legal, and in the best of cases the Social Sciences were introduced only as subordinate to law. As there was no special examination for these subjects there was no certainty at all as to the attendance of the candidate at lectures. At least two outstanding authorities and former officials have explained how the natural result of the regulations and their busy apprenticeship made it impossible for them to do justice to the Social Sciences without the generous help of a 'crammer'. Two things had, however, been gained: it had been admitted that the legal and the administrative careers were separate and ought to be prepared for differently, and provision had been made for an apprenticeship period with the local authorities. The law of 1879, though it lasted until 1906, was the end of one period - the predominance of law—and the beginning of another—the representation of the Social Sciences. The beginning was weak, and to be strengthened, it needed further critical attention. This, as obtained between 1879 and 1906, was more a momentary refreshment than a lasting relief. Criticism came from two sources: from the Universities which were teaching law and economics, and practical statesmen, in office or in Parliament. It is instructive to review briefly the nature of their argument.

The Universities. It is quite obvious that if civil servants are selected by tests based upon a certain prescribed University training, the value of that test is to be sought in the actual nature of the train-

[1] Cf. Delbrück, op. cit., p. 15.

ing. Between 1879 and 1906, and even after this date, the Universities showed many signs of serious dissatisfaction with the manner in which students applied themselves to their work, and with the intrinsic value of the Law studies. It is difficult to tell how bad the candidates were, or exactly where to place the blame, and even more difficult to know whether the great German jurists who took part in this long campaign were judging their own generation by the past, by other countries, by the needs of the Services, or by a high ideal of scientific learning. On the whole, the last two considerations were their standards. Among the critics were Schmoller, Gneist, Gierke and Jhering, and there were many others whose reputation though not as world-wide as these, yet counted for much in Germany.[1]

The Defects of Legal Training. The gravamen of their charges were these. The teaching of law had fallen into a state of sterile dogmatism.[2] Where the theory of law was taught at all it was not kept in a wise relationship to the actual law as it appeared in everyday practice, but was not seldom composed of a fabric of doctrines based upon a tissue of major premises untested by reference to the nature of social life. Analytical work, in which history and economics were used to explain the growth and operation of the law, was very rare, and this lack exercised an unfortunate influence upon seminars and lecturers. The main cause of this dry abstract and detailed dogmatism was the nature of the Prussian legal codes: they were isolated from the surrounding life of the other Germanic European States, they were neither the perfect continuation of the old German customary law nor corollaries of Roman legal principles, but curious mixtures tinctured with the theories of the men, great men, of course, who had written them. Their very minuteness of detail inhibited mental elasticity in their treatment. Only the great teachers could rise above the compulsions of these codes. The student was then apt to be trained to repeat a number of formulæ, obtained no grasp of legal principles and, therefore, since he had an examination to pass, learnt to pass it by a short period of concentrated memorizing. This was quite natural, since the most successful conditions for memorizing are definite dogmas and the stimulus of an approaching event.

If the law were to be taught with due attention to its sociological nature a period longer than the prescribed minimum of three years was essential. Neither law by itself, nor law together with an adequate preparation in economics and political science could be mastered,

[1] The whole subject is treated, and the views of the principal contributors reviewed, in *Rechtsstudium und Prüfungsordnung: Ein Beitrag zur preussischen und deutschen Rechtsgeschichte*, by L. Goldschmidt, Judge and Professor of Jurisprudence, 1887.

[2] Cf. *Ein Beamtenleben*, by Adolf Wermuth (1922), p 31 ff. This goes back to 1880. Wermuth became Secretary of the Imperial Treasury, and Oberbürgermeister of Berlin.

in less than three and a half years, some said in four. And even the three years then prescribed could, at that time, be reduced to two, as the one year's service in the army was counted in.

It is common knowledge, of course, that exceedingly great care has to be taken in the teaching of any non-experimental faculty. The student is obliged to occupy a merely passive and receptive position towards the teacher, and a large variety of devices must be consciously used to stimulate attention and awaken co-operation. Of all such non-experimental studies law has, perhaps, the hardest task in getting itself accepted by the average student. Most humane of all in its social effects, it is least human in its form. It ties the mind and tires it. The most successful law school in the world, Harvard, has succeeded in solving the difficulty of vividly interesting the student, only by converting the student into a judge and the seminar into a court for particular cases, by the case-method.[1] Only a very few gifted teachers in Prussia had made an approach to such a system, and, for the rest, the students, finding that their lectures were merely expositions of what was already exposed in textbooks and commentaries, spent their time in riotous living and passed their examinations by memorizing laws, but not learning law. For this we cannot entirely call the teaching to account: the traditions of studentship have a great deal to answer for.[2]

This was followed by a 'cramming' establishment—as the famous Parliamentarian, Eugene Richter, once called it, 'the express-assessor-factory near Potsdam'.[3]

The students, in the fashion still permissible in Germany, divided their three years among various Universities. There was no means of controlling their work or attendance at lectures, and when the

[1] And even this entails the penalty that the student loses, or rather never acquires a sense of the whole system of law, and its total significance in the social order. Cf. Redlich, *The Common Law and the Case Method*, Carnegie Foundation, Bulletin No. 8, 1914; also cf. Valeur et Lambert, *L'Enseignement du droit en France et aux États-unis*, Paris, 1929.

[2] Schmoller, an authority of the highest rank, said: 'It is a piece of mediæval rawness and barbarity which maintains itself side by side with the highest culture and the greatest moral efforts, and for which too many academic teachers and high officials, in idealized memory of their own youthful silly pranks, have still kept an indulgent eye. I am, however, very much afraid that our higher officialdom has not grown of a stature for its tasks if it wishes to maintain the privilege of dedicating four or five terms (from two to two and a half years) to taverns, duelling, loafing about, and vain playing with social forms. It is often said that those who have thus dissipated themselves later on become the best officials. Of course, some individuals who come from good family and have great talent do afterwards make good officials; the majority, however, become, as a result of such behaviour, simply dull-headed, *blasé*, and devoted to indulgence and gaming. A comparison with our army officers ought already to teach us that *such* freedom is not necessary to the development of fine characters—the theologians, philologists, and historians are not as lazy as the jurists.' This is only one of a large chorus of such voices, unfortunately in harmony.

[3] 'Schnellassessorenfabrik zu Baumgartenbruck bei Potsdam.'

first examination threatened they gravitated to the University in which conditions were easiest.

Those whose social antecedents proved satisfactory to the high local and judicial authorities to whom they then applied for admission into the preparatory service, then spent their time in a minutely regulated order of duties—regulated, the law of 1869 declared, to give the novice experience of all branches of judicial practice—the Bar, the notary's office, judgeship and office-work. All this in four years! The result, says Goldschmidt, was only to reduce real talent to petti-fogging routine. (It did, in fact, drive both Bennigsen and Bismarck out of the Service.) The division of the preparatory service into stations—each, however, distasteful or useless to the novice, to be served for its prescribed time, forced all into the same mould, and unnecessarily broke up the general view of the judicial process which was obtainable from any one or two of the prescribed stages. It was entirely a matter of chance, and still remains so, where and under whom the novice serves his four years.

The final examination arrives. The candidate has been to the 'crammers' in Berlin. He appears before three or four judges of the High Courts, whose idiosyncrasies have been well studied beforehand by the 'crammer'. No teachers sit with this examining board; nobody but lawyers examine. He does his written work, and sustains an oral examination. Fifty out of every hundred candidates are failures. The President of the Judicial Examination Commission reports from time to time upon the results of the examinations. In 1880 the report,[1] covering several previous years, says that some candidates bring together material from different authors without sufficiently sifting and logically ordering the information; while others do not sufficiently master the material and, therefore, either remain confused and without opinion and its legal foundation, and cannot at all realize what the nature of the problem is, or make very serious mistakes in answering the problem. There is a lack of clarity and analytical power. The theses show tedious irrelevance and solutions by reference to teachers' opinions and not to the laws themselves. The texts were insufficiently studied, the commentaries being preferred. The report recommends the teachers and students to concentrate upon the letter of the law before proceeding to the commentaries thereon.

We have already said that economics and political science became the handmaiden of the law. Students learnt that few, if any, questions involving real study were likely to be put to them. These studies, then, were given only perfunctory attention, although the law required satisfactory knowledge of 'the principles of Political

[1] Bericht des Präsidenten der Justiz-Prüfungskommission, 10 Februar 1880. (Digested in Goldschmidt, op. cit., p. 211 ff.)

Science'. The Universities, conscious of their importance as preparatory and selective institutions for the judicial and civil service, frequently expressed the wish to make more of these studies. But the examination is the only effective sanction of such a policy, and the examination did not demand this knowledge.

On all this it is difficult for a foreign observer to make an effective judgement. But the evidence is voluminous and authoritative. The training of future officials and their selection had in process of time ceased to keep pace with the demands of the modern State. Law had become divorced from its origin and its purpose, and a narrow and pedantic formalism had invaded a field in which pre-eminently the truth of real life is essential. This evil was unfortunate for the judicial service, but since the preparation for the judicial service in its first four years or so was also the preparation for the administrative service it threatened to become disastrous for this latter also.

The truth was that economic life had taken such a direction that the State was bound to interfere with its processes, and this interference could only be properly carried out by appropriately trained officials. Goldschmidt formulates this idea thus [1]:

'Since the German Empire has become a world-power, and most important political problems have fallen to German diplomacy, and the representation of commercial and industrial interests of Germany all over the world is incumbent upon the German consulate, and, finally, the growing colonial policy demands profoundest understanding of the most difficult international questions, there can be no doubt at all about the directly practical interest of the Empire in the careful professional education of its numerous highly responsible officials.'

And again:

'Those who now enter political life without a proper knowledge of at least constitutional law and political economy, knowing only a part of the indispensable, will be without counsel and open to every gust of public opinion, in the ever more violently swelling battle of social interests.'

In such a background there was no special title for a study which in the words of the greatest German Canonist, Böl, was '*cadaver sine anima, hominem sine mente, monstrum deforme et chaos perplexum*'.[2] Yet the predominance of this study did blight the student who aspired to the Administrative Service. He did not appear before a Judicial Court of Examiners, but before the 'Examination Commission for Higher Administrative Officials'. The examination was to determine whether the candidate could be considered 'capable and thoroughly prepared successfully to occupy an independent position in the higher administrative service'. But they had, excepting for their two years, followed the same course as their judicial colleagues, and their choice of ultimate career was not always decided upon until

[1] Op. cit., p. 289. [2] Goldschmidt, op. cit., p. 254.

the latest possible time, that is, after his two years of preparatory judicial service. Further, the final examination was taken before practising jurists, at the most a teacher of law was included, but never a teacher of political science. A small treatise written in 1902 on the subject of legal studies and the judicial and civil service essays to show that little or no improvement over previous conditions had occurred.[1]

Political Critics. We have a full-length picture of an official preparation of the time by Hellmut von Gerlach.[2] It corresponds to the main traits we have discovered in the general discussion.[3] Delbrück, though asserting that the law of 1879 had on the whole good results, admits that the faulty political science training became ever more disturbingly observable. He points out that the State was now undertaking tasks like the creation of a tariff system, the promotion of agriculture, trade and industry, care of small industries and the maintenance of an independent industrial middle class; there were many subsidies and loans for the promotion of rural industries and cattle-breeding, and compulsory organization of various industrial groups had to be executed. Co-operative societies of all kinds were encouraged and regulated, and schools, technical and agricultural, were established, and related to the general economic life. The Civil Service did the best its training fitted it to do, but when Bismarck undertook his share in the development of social policy he found the civil servants of so little use that he set up an Economic Council. He scorned 'the doctrinairism of omniscient ministerial councillors', 'private secretaries' decrees' and 'schemes issuing from the writing-table'.

In the 'nineties the desire for reform became widespread. From now on the discussions of faults and remedies become of radical importance since the problems disclosed are elemental and affect all countries. Public discussion was first initiated by the Finance Minister, von Miquel, in 1895. He suggested a reduction of the time spent by administrative officials in the judicial service from two years to one, so that they might have a longer time in which to learn administrative law, social policy, economics and other branches of science. The long time spent in the Courts merely took away from the time which should be devoted to that which was ultimately to be the life-career.[4]

[1] Hermann Ortloff, *Zwischenprüfung oder Zwischenzeugnis im Rechtsstudium?* Jena, 1902

[2] Op. cit., p. 45: 'After the conclusion of my time in Wurzburg I had to contrive energetically to acquire the necessary measure of law to pass the first examination. In Leipzig I went to very few law lectures, and limited myself to economics, especially to Roscher's lectures which were the most valuable part of my studies. In Wurzburg I hardly knew where the university was located.' He then crammed. See also p. 46 ff. He says that the judges were not so helpful to those who were going into the Administrative Service afterwards.

[3] So also Georg Michaelis, *Fur Staat und Volk*, 1922.

[4] Von Schwerin, op. cit., p. 15.

An interdepartmental commission was set up to inquire into the system and suggest remedies. It was rather favourable to legal training, so favourable, in fact, that there were desires expressed that only those who had been through the entire judicial preparatory service should be appointed to the Civil Service—but only the maintenance of the *status quo* was actually recommended. The Commissioners thought that any increase of the length of study—the favourite advice of the Universities—would only cause a further waste of time. The standard of the examinations ought to be put up. The preparatory period should be adjusted more to the advantage of the Civil Service. A special official should, in each Government District, be entrusted with the continued education of the civil servants during the preparatory period and the latter should continue to attend special courses of lectures related to their work. They should be encouraged to make journeys at home and abroad and get employment in important branches of industry, at consulates, the central co-operative bank and similar institutions. Even establishment of a special administrative school was mooted. The Examining Commission should include a teacher of political science.

A lively discussion in the Press followed, and in 1902 the Government introduced a project into Parliament the main object of which was to lengthen the University course to three and a half years and reduce the preparatory service to the same period. No division took place. The measure was re-introduced in 1903. There were very diverse views of the course to be taken. Some complained that the Government had not proposed the reform of University studies and the examination which immediately followed thereon. The familiar view that constitutional law and political science should be included was expressed. Another attitude—and one that has become predominant in the course of the last few years—was taken by Richter: already at the University, the civil servant ought to have a preparation quite separate from that of law students. The Government had conceded a reduction of the work before the Courts to nine months for civil servants: opinion swayed between this and one year. There was a wide variation of opinion upon which departments were best as the first preparatory stages. Here the overwhelming opinion was that it was very desirable that at least part of the time should be served in non-State institutions: like Chambers of Agriculture and Commerce.

Direct Contact with Social Affairs. This was a very important suggestion and, indeed, the whole development of opinion about training for the Service was really towards something of this kind. For what is, in reality, the essence of this suggestion? It is that the official should come into actual contact with—nay, more—actually participate in—the ordinary daily work and life of society. When the schools said that legal theory and commentaries were not enough,

the alterations they proffered were those which introduced into the seminar considerations drawn directly from the life of the field, the factory, and the counting-house. It was an attempt to prise open the definitions and formulæ of the study and let in the breath breathed by the outside world, to show that definitions and categories are artificial things which conveniently docket, but always cramp, confine, and distort, reality. The step was not a long one from the seminar enlivened by the mind fresh from practical tasks, or contact with people engaged therein, to the fertilizing of book-study by the student's *direct contact* with the institutions he read about. In a tract already mentioned the author goes far towards this:

'More than before does modern youth live in the midst of public life, for this more than for anything else has he an interest and this he acquires from modern methods of intercourse—from the Press, the daily questions of politics, of administration, justice, constitutional and international law, party manœuvres, and so forth. All this gives him more to think about than dry dogmatic doctrines from which he stands further away than from the more lively contemplation of all public life and the way it functions. In the first half of his student-years there belong naturally those lectures which are of an introductory and preparatory significance, those which lead towards an immediate understanding of the things of which the students get a vivid conception by newspaper reports, the hearing of speeches in Parliament and at meetings, which concern themselves with questions of the day, also in criminal cases, public sessions of the administrative authorities, arbitration, commercial and industrial courts which invite them to meditation, the discovery of the main purposes and ideas, and to judgement of behaviour and its results. Thereby in time an interest in real things is awakened, which are now in the foreground of social and political life. . . .'

Away from mere Book-Learning. This is the problem which has arisen wherever sincere thought has been bestowed upon the question of properly training officials: How to overcome the natural effects of book-learning? Can it be left to the student's own devices; ought there to be a preparatory period in the Service; or outside the Service; will travel be of value? The question reminds me of a story told me by Justice Holmes of the U.S.A. Supreme Court. A young man left the Harvard Law School and after a few days of law practice sent back an excited telegram, 'I have *seen* a Writ!' The necessities of the modern Civil Service go further: it is not enough that officials see the levers they have to pull, but that they should be vividly acquainted with the nature of the enormous tangle of objects and men attached to the other, the invisible, end of the lever. Plato long ago warned us not to teach with our backs to reality and our eyes only upon moving shadows.[1]

The project of 1903 was debated from time to time for three years before it became law. While the Government recognized the value of the suggestion that part at least of the preparatory service should be spent in non-State institutions, it could not see its way to allow for

[1] *The Republic*, Bk. VII.

this in the time, which it considered too short, but supported the view that such experience might be obtained after the Final Examination was taken. My own experience leads me to believe that German Governments are fairly liberal in granting leave of absence to promising officials for travel and study. They have a wide but definite problem set them—e.g. the operation of local government, the organization of some industry, statistical method, the development of social and industrial policy, the working of Royal Commissions—and they are given from two to six months in which to explore the ground chosen.

The Minister of the Interior, Bethmann-Hollweg, in after years famous for a diplomatic blunder of the first rank, best represented the mind and intentions of the Government. In his opinion the whole error in the past had been the long time for which the future administrative official was bound to judicial service. Two years with an administrative authority was insufficient time for adequate practical work, or a good theoretical grounding. Further, if proper arrangements were made for theoretical training of the candidates when they were already employed and not so many dissertations were required of them, they would need to spend less than the usual time, sometimes a year, preparing for and doing examinations. The Government's memorandum *to its project cogently expressed this view.*[1]

The most important remark came at the end of the speech, and it pointed to a fact which had caused perturbation before and which has since been the subject of anxiety. *In Germany*, the Minister said, *officials attain to responsibility and independence at too late an age.* In other countries the young man of thirty was already in the centre of independent activity, and even in Germany, in other professions, the man of thirty could look back upon a number of years in which freshness, resolution and energy had already accomplished a great deal. We will not at this point dwell upon his opinion, but it raises a question of great significance, and we shall discuss it in connexion with the latest movement for reform.

The Act of 1906. The result of the discussions was the Act of 1906,[2] in which the main lines of criticism were given effect. This Act functioned until 1920, when certain amendments were made for reasons

[1] Wandersleb, *Die Befahigung zum höheren Verwaltungsdienst*, 1927: 'The development of communal life in the various kinds of local authorities, the introduction of administrative jurisdiction, the comprehensive elaboration of taxation law, the growth of social activities on the part of the State, the far-reaching development of trade and agricultural branches of production, in short, the increase of the total cultural and legal needs of the people in all of its strata have so furthered the development of public law through legislation and administration that the individual can no longer master it all. It is therefore indispensably necessary that those who wish to find their way properly as civil servants in this field of interlocking legal relations and practical needs must be introduced into the disciplines to be mastered as soon as possible.'

[2] Gesetz uber die Befahigung zum höheren Verwaltungsdienst, 10 August 1906, *G.-S.*, p. 378.

which will become plain when we review the nature of the new dispensation. Let us imagine that we desire to enter the administrative service after 1906.[1] We would be obliged to take at least a three-years' course of law and political science at a University and then take the first law examination at school. Our University teachers are hardly satisfied with our stay at the University for only three years, but the Government holds that as we spend more time in this way we shall ultimately enter upon our duties at an age when all our freshness of mind is gone, and when, therefore, they can do very little with us. Now while we are at the University it may be true that we shall be wasting some time—perhaps a good deal—if we join one of the Students' Corps,[2] but it will more than repay us in the long run, since relatives and friends, even people who are not related to us who once belonged to the same corps, will give us a helping hand and will prefer us to other candidates other things being equal, or even more than a little unequal.

The Final Examination comes. The subjects are public and private law, legal history, and principles of political science and economics. The examiners are by statute instructed to explore our knowledge and insight into the nature and historical development of law, and to see whether we have a general legal and political science education necessary to our future profession. We now approach our four years of practical work, and it is fortunate that we are not of the generation before 1906, for they were obliged to serve two years in the Law Courts before proceeding to their real work: we have only to serve one year in the Courts, and this may be reduced to nine months by the Ministries of Finance and the Interior.

The year or the nine months pass. They were not wasted after all. For the Courts to which we were attached—the *Amtsgericht* or the *Landesgericht*—gave us a very good insight into procedure and administrative law in actual practice. We have now to be accepted into the preparatory service by the President of one of the fifteen prescribed Government Districts—an official of high status and important powers. Our English colleagues have no such arrangement as this whereby an authority other than the central departments chooses us. And, in fact, the practice in Prussia has not been quite unchallenged. It is the ancient Prussian practice, but suggestions for modifying it were made in 1875 and later: the Government as a rule wanted to leave the matter as it is to-day in order to avoid burdening itself with duties which can be quite well performed elsewhere, and its Parliamentary

[1] This description is based upon the best two commentaries: von Schwerin, op. cit., Member of the Examining Commission for Higher Administrative Officials; and Wandersleb, op cit., Assistant Secretary in the Prussian Ministry of Commerce and Industry, and private information.

[2] Cf. for a good description of student life in the Corps, Sudermann's novel, *Der Tolle Professor*; also Presber's *Mein Bruder Benjamin*; see also Michaelis, op. cit., Bismarck's *Reflections and Reminiscences*, the first few pages.

supporters argued appointment by the Government as futile, since the Ministers could not possibly know enough to exercise a proper choice, whereas the local authorities who were responsible for the practical preparation of the candidate could more justly take the responsibility of choosing. It was further feared that central appointment would result in political higgling, since the central authority is subject to a great deal of Parliamentary pressure. On the other side it was emphasized that central choice would mean uniformity of principles and a cessation of misunderstandings and suspicion about the motives of the President of the Government District.

There are, indeed, certain persons the President is very unlikely to choose. It is fortunate, for example, that we are not Catholics or Jews [1]; that our father is not publicly known to be a Socialist. It is doubly fortunate if one's parent was an official, or if he comes of a well-known high bourgeois family, and especially if one's family has bequeathed to us the noble *von* in our name. None of these is an obstacle to us, and we have further officiated in a *corps*, served in the Army, are of good physique, we are not too old to enter for our Final Examination by the age of twenty-nine, and we have attended sufficient political science and economics lectures to satisfy the conscience of the President that the regulations have been kept.[2] *Let it be noticed that it is in the power of the President to refuse candidates: in other words the Prussian (and therefore also the Imperial) system of recruitment is not* open *competition. The British system is entirely* open *competition.*

The three and a quarter years of preparatory service are so regulated as to give a conscientious servant a splendid opportunity of acquiring wide experience. The sanctions available to the President are such that any servant who ultimately stays in the Service is certain to have made good use of his time; for the President may put off the Final Examination and in cases of gross misbehaviour or waste of time even dismiss the Referendar. The three and a quarter years are divided up as follows: twelve months with a *Landrat* (the executive officer of a local government area known as the *Kreis*), three months with a small popularly elected municipality, at least fifteen months with the Government District Authority, and District Committee (*Bezirksausschuss*). As Referendars, we will be placed in those local authorities, urban and rural, where we shall get an opportunity to survey a wide

[1] For the distribution of Civil Servants into various religious categories, cf. the analysis in Kamm, *Allgemeines Statistisches Archiv.*

[2] Minute of the Minister of Finance and the Interior, May, 1882: 'According to Article X of the law of March 11th, 1879, the University study of political sciences is to be considered as an indispensable condition for the higher Civil Service in so far as a judicial service candidate, who has only studied law at the University—completely omitting political science—may not be accepted as an administrative official, even when he attempts to make up for this by later studies, etc.' The Minute could, however, apparently be complied with if a testimonial proving attendance were produced. Schwerin, op. cit., p. 42.

field of administration, to see the whole process of government in a particular area. It is probable that we shall be sent to a municipality of the first and second size and there we shall be overwhelmed with the enormous scope of its work and finish by being confined to some special branch only. If the opportunity occurs, we shall be made deputy of the head executive official—like the Bürgermeister,—for a time, and every attempt will be made to awaken the feeling of self-sufficiency and responsibility. Care will be taken, according to the Statutory Rules, to give us work and explanations which will systematically promote our understanding of the social sciences, though attempts will be made to avoid weighing us down with details. When we are in the Government District Authority our work will be so organized that we shall see the whole field of its activity, including the Educational and Financial Division, but wherever a particular situation is not calculated to add to our comprehension of principles, we shall be spared. Our apprenticeship will stretch from thorough occupation in the Registration and Accountants' Office to the making of verbal reports in Departmental meetings, and travelling commissions to State and non-State institutions. In the sub-district of the Government District—the *Bezirk*, we are employed for many months, since here it is possible to take a continuously active and rather significant part in the work (the authority is, of course, not nearly as important as the *Regierung*). The law only prescribes stages for thirty months in all, the remaining nine months of our time we spend at the discretion of the President in the kind of work which will best complete our experience. In the *Regierung* we are under the constant tutelage of a special official: he gives us advice, explanations, acts generally as a mentor in official matters and in the matters of opportunities for furthering our knowledge by taking special courses of lectures and so forth.[1] Nor are we exempt from moral and political care.[2] Our mentor makes reports upon our conduct, and a wise provision of the law arranges that mentors shall from time to time be present at the sessions of the Examining Commission and attend the meetings to class the examination scripts so that they may learn the policy and standards of the Commission. Every authority under which we serve makes a report upon us, and the *Landrat* pays particular attention in his to our relationship with the public in the district. A final and comprehensive report is made by the *Regierungs-Präsident*, and all the reports are put before the Examination Commission.[3]

[1] The *Vereinigung für Staatswissenschaftliche Fortbildung* was founded in Berlin to arrange for advanced courses in various towns for higher officials.

[2] Cf. von Gerlach, op. cit., *passim*. Though this deals with a time antecedent to 1906 the nature of the preparatory service seems not to have altered much in this respect.

[3] The Examining Commission, then appointed by the Crown, consisted of nine members. These were the Under-Secretary of State for the Interior (President),

The *Regierungs-Präsident* decides when we are fit to take the Final Examination. This is done by requiring the apprentice to make a considerable report upon some subject arising in the course of his work. There is no legally stated field of investigation; it is left entirely to the President and the Referendar to determine. It may be on the practical or the theoretical side. It may be financial or institutional. But it is desirable that its preparation should require a thorough acquaintance with constitutional and administrative law.

The Final Examination. The Final Examination is written and oral, and extends over the public and private law valid for Prussia, and further, constitutional and administrative law, as well as economic and political science. The question of all questions is: Is the Referendar likely to be able to act independently and successfully in the higher Civil Service? Has he a sound enough grasp of the duties and purposes of the State in economic and financial matters? On each of two days we write a dissertation on a topic (till then undisclosed) with the aid of certain reference books which are provided in the examination-rooms. A third day is occupied in the preparation of a verbal report. Then follows an oral examination. A candidate who fails may reappear once more; a second failure is followed by exclusion from the higher Civil Service.

The striking feature of the topics set for examination is their extreme practicality and technicality, and their wide range. Not that all are technical: some are upon the history of economic and social theory. The vast majority ask for judgements upon a narrow set of circumstances; the answering of these clearly demands a fund of exact knowledge, a firm grasp of legal and economic principles, comprehension of the conditions of the effectiveness of institutions, and the ability to focus correctly the general light of science on particular cases. Little or no room is left for metaphysical adventuring, and the confines within which doubt and curiosity might arise are rather narrow. On the whole, the German procedure compared with the British shows a wide and important variation: the German being based much more upon the correct use of authorities, the British more upon personal judgements. If this diagnosis is correct the situation it reveals is important, for it may be that much of the formalism with which German bureaucracy has been charged by native critics is due to the spirit and training which have their expressions in this type of examination—nay! to the ultimate view of private and public life which engender these. The examiners believe that these are the proper questions to ask, they hold this belief because

two Assistant Secretaries from this Ministry, one Assistant Secretary each from the Ministries of Finance, Education, Religion, Agricultural and Commerce, a Councillor of the Supreme Administrative Court, and the Professor of Political Economy of the University of Berlin. These divided into smaller examining bodies at need.

they have a mental picture of the kind of civil servant they want to secure: men learned to the point of pedantry, and logical.[1] This produces civil servants more useful in a static than a dynamic State; excellent interpreters of the past but not inventors of the ways and means of the future; apter to explain than to evaluate; and inflexible in the power to make exceptions—which is nine-tenths of administration. Where the Germans are lacking the British are rich, but these have their own faults which we shall analyse later.[2]

Reforms of 1920 and their Causes. This system of recruitment operated until 1920 when minor changes were made. Those changes were the first results of a rather widespread feeling that thorough reforms were necessary if the Civil Service were to acquire the qualities essential in the modern State. Since the creation of the Empire in 1871, Prussia's influence went far beyond its own boundaries; its indigenous effect was over two-thirds of the territory, and when we add that *the choice of officials for the Imperial Departments is from the various states in some rough proportion to their importance*, the significance of the Prussian method was great enough to rouse widespread interest, and even anxiety. The views we heard expressed in the 'eighties and afterwards, on the nature of legal study, still occasionally recurred, and they hammered, as before, at the theoretical and dogmatic nature of the teaching and the remoteness of the students from practical life.[3] Then came the War. The unfortunate are morbidly curious about the causes of their downfall. A flood of self-criticism was the result, and many students, teachers and statesmen made a determined resolution to cut off faulty limbs and review the sources of their vitality and purpose. They were determined as never before conscientiously to master the parts of their gigantic political machine.[4]

The classic sign of this spirit in the context of administration was

[1] Cf. Nostitz, p. 137. *Verein fur Sozialpolitik*: 'I cherish no illusions that we shall eliminate this aloofness from the world (*Weltfremdheit*) of our lawyers by economic training only. This aloofness has other causes as well, and that to which we give this name is not aloofness at all; it is based upon our German excessive thoroughness, upon our petty striving for formal accuracy, and upon our desire to accumulate legal guarantees, so that the single judge, happy in his responsibility, is displaced by a college of judges, courts are increased in number—owing to what I should like to call the "picking over" of conceptions (*Begriffsklauberei*)'

[2] The effects of the study of law compared with those of economics were later discussed at the meeting of the *Verein fur Sozialpolitik*. We extract and translate the most significant passages.

[3] Gerland, *Die Reform des Juristischen Studiums*, Bonn, 1911; and an earlier article in the *Deutsche Juristen Zeitung*, 1 May 1909.

The author is Professor of Law, and wrote an able treatise on the English judicial system.

[4] Cf. Bozi and Heinemann, *Recht Verwaltung und Politik im Neuen Deutschland*, 1916, especially pp. 19 ff. and 33 ff.; also Grabowsky, *Die Reform des deutschen Beamtentums* (Berlin, 1917), especially the introductory article, and then pp. 61 ff., 80 ff., 87 ff., and later, Max Weber, *Parlament und Regierung*, 1919.

a short tract by the statesman and administrator, Clemens von Delbrück.[1] It was written a year before the end of the War, and its analytical power and cogency won it an influence which time has not yet dissipated. It anticipates the general direction of thought in ensuing years, and its main thesis has since received substantial reiteration. It is for us a convenient point of departure. Using it as such we will occasionally digress from the purely annalistic narrative of theory in order to discuss the more important features in the development of ideas, sometimes carrying forward the discussion to dates later than 1917.

Law *v.* the Social Sciences. Delbrück starts with the already familiar analysis of the political economic activity of the modern State. The nature of this activity imposes upon the administrator a task vastly different from the judicial function. The judge works within rigid norms and does not judge by the consequences of his judgement but by those norms. The administrator, on the other hand, has a wide field of discretion, and the consequences of his actions are of the essence of his decisions.[2]

'He must, therefore, know what economic and political consequences his decisions will have for the individual and the community. He must arrange his measures that they benefit the public welfare and do not injure the individual without necessity. He must also be zealous to serve the individual, as far as he can, without injury to the community. In economic measures the administration is pre-eminently free in its resolutions and is bound to the law only in respect to their formal conditions and execution. . . . Allegory was wont to show us justice with bound eyes, and if we desired to pursue this figure, we should picture administration with eyes very wide open.'[3]

The task is a particularly delicate one in a constitutional State, for the Civil Service must maintain an impartial attitude in a policy founded upon and directed by party conflict. It must serve the people and not antagonize Parliament, take political decisions but avoid political enmities. The impartial position of the Civil Service is emphasized in a later study by another writer, and he points especially

[1] *Die Ausbildung fur den höheren Verwaltungsdienst in Preuszen*, Jena, 1917.

[2] The antithesis has also been put thus: 'The administration of justice and administration are inherently different. This is demonstrated already by the fact that the judge has a list to work through, that is, the cases laid before him, and he can only deal with these. Beyond this he has no initiative. The administrative official, who merely settles cases which are brought to him by the public, is a very bad official. His office demands more of him. He must take action independently, draw matters to himself, and often himself provide the most important part of his work. He must pursue the needs and the development of life and economic activity; he must preconceive the uniqueness of separate things by the aid of creative phantasy, and make decisions. For this purpose the law is not an end in itself but a means to an end. Law only affords him the possibilities and limits of his activity. With the judge it is otherwise, although I am strongly of the opinion that the creation of law is the business of a judge, yet as a rule he will do no more than subsume cases under their respective paragraphs' (*Nostitz, op. cit., p. 140 ff.*).

[3] Op. cit., pp. 26, 27.

to the need for keeping the great economic and social groups, technique and capital, in social order. Such qualities as this implies cannot be bred by the study of law: only the social sciences can serve.[1] But this does not mean that the administrator is to be trained in the social sciences only; for law must have its place, though a subordinate place in the total scheme.

For How Many Years Shall Training Last? When this matter is decided—that there must be a separate training for the administrator, and that the social sciences should be the chief in his curriculum, Delbrück turns to the question of the length of training. We have already said that this question has troubled German opinion for years, and was expressed in Parliament by Bethmann-Hollweg in 1906. Delbrück remarks that the German higher civil servant does not get the opportunity of independent work until he is about thirty. Not until he is about thirty-five does he, perhaps, become a *Landrat*, that is, an official with an appreciable scope of power and responsibility. This training is too long. Delbrück is, in this opinion, only one of many voices. The noted economist, Professor Schumacher of Berlin, speaks from his own experience (as Delbrück does) when he says:

'I am not sorry that I was once a Referendar—I learnt an extraordinary amount during that time; but I must assert that I suffered very much under the oppressive feeling that I was entirely chained up just in the years when I most strongly felt the impulse to act. Since then, I consider it to be one of the worst faults of our general organization that we let a great part of the most valuable talent in its most important years of growth wear itself away with waiting in non-responsible and, to some extent, insufficient work. (Here the Assembly cried: "You are right.") . . . It is fundamentally unsound to take away from a young man until nearly thirty both economic responsibility for himself and material responsibility for his work.'[2]

This view is represented in other places also.[3]

It is a valid and vital criticism of German recruiting methods. The British method has been strongly opposed to putting off the age of responsibility by a long period of preparation. The men who thus expressed their opinions about responsibility did not define it. They only *felt* its definition. But expressly to define it is to assert unequivocally why it cannot be put off to a late age, as well as why, too, an early age may equally be disastrous. RESPONSIBILITY IN OFFICE means freedom of judgement and action combined with unlimited liability to suffer the natural consequences of a mistake or enjoy

[1] Bruck, *Das Ausbildungsproblem des Beamten in Verwaltung und Wirtschaft*, Leipzig, 1926, pp. 14, 15.

[2] Schumacher also humorously remarked that the thwarted desire for activity caused the production of a substitute: 'that pretentious bearing towards others that has so often given offence.' Cf. *Verhandlungen des Vereins für Sozialpolitik*, etc., p. 77.

[3] Brück, op. cit., p. 34.

the natural consequences of success. This implies in a person thrown into such a position some kind of spiritual balance between his own various faculties caused by his contact with the possibilities of suffering or enjoyment and with the objects or persons who form the material upon which his judgement and activities are to be exercised. They will have an effect upon him, as he upon them. The result of the experience is to produce in the responsible person a knowledge of himself (it may be deep or superficial), of other people, and of inorganic environment. He will learn, *in the uninfluenced measure of his capacity to learn*, how much and how little man can do to secure a control over Nature, and what he is able to add as a personal contribution. He will measure his *own* strength and weakness, and learn the worth of his own personality. And measuring this, he can measure that of others, and again, knowing others, he can again recoil upon himself and estimate his own place and value. No study yet invented offers so subtle and extensive a variation of happenings upon which to exercise the judgement as human affairs themselves. For every object of study has its own nature, the way in which it is manageable, and the impression it produces upon the mind. The full effect of this is to be felt only by unhindered and unaided access to the objects themselves and the joys and sufferings emergent directly from them.

It is clear that the sheltered and cloistered life of book-learning, with parents paying your way, and a long preparatory service when you are neither civilian nor civil servant, and when not a pittance is paid you nor a day passes without tutelage—that all this places a screen between the spirit of the novice and his own personality. There is no connexion between what you eat and what you produce: you answer not to those who may suffer by your activity, but to some one who stands between, who cannot take you completely *au sérieux*. The tenets of the schools are not graven into the character by the erosive power of immediate reality. That is, you are devoted to an academic description which is not really appropriate to your profession. And the longer this goes on the more powerful do the inhibitions or the incitements, uniquely created for and by this description, isolate you from neighbouring aspects of life, sometimes from life itself.

It is a moot point exactly where to draw the line. Freshness of mind is at times strangely akin to dangerous ignorance. Some academic and tutelary guidance is essential. It can obviously, however, be overdriven. And this as much as the study of law has made the German Civil Service pedantic, authoritarian and unadaptable.

Delbrück was accordingly opposed to any lengthening of the University course. He suggested the abolition of the nine months of judicial service for the administrative officials. Nine months

would be won for administrative preparatory service, and whatever of private and criminal law these officials needed they could learn at the University where, however, Administrative Law should be their chief legal study. The proper subordination of law to the other studies, but the combination of the two, would be useful not only for administrative officials, but also for all those who desired to serve in local government, journalism, or Parliament. He looked forward to a single faculty uniting Political Science with Jurisprudence. The studies should be followed by the first University examination, a preliminary to the preparatory service.

Theory and Practice. The next topic is, like the question of age, a widely discussed one: what can be done to secure that when the student enters the Service, his judgement shall be less theoretical than it is after the ordinary University training? We have already adverted to this problem—it has by no means ceased to occupy the attention of German thinkers. One solution discussed, but refuted by Delbrück, is the introduction of a Practical Year into the *middle* of the University Course. (Delbrück states an alternative: one year's employment in a local authority before the student enters the University.) It is urged that the practical work would enliven the students: their elementary lectures would prepare them for this year and their practical year would prepare them for their final and advanced lectures. (Delbrück rejects the intermediate year on the ground that it would increase the academic years to four: and the alternative suggestion on the ground of its impracticability.)

German teachers show signs of worry about this problem: the student with an economic and law degree has even been likened to a medical student who begins practice without clinical experience.[1] There is an extraordinary unanimity of opinion about the 'world-strangeness' (*Weltfremdheit*) of the German official. There is not the same unanimity of view about its remedy. A director of a private business insists [2] upon the necessity of practical study before an occupation can be undertaken, and says that no system whereby the student goes for short periods, weeks or months, into one business after another can give him the required intensity of experience, since an unbroken stretch of time is necessary for him to become really acquainted with the conditions of labour, and the working class, and social legislation, and taxation relating to industry. The representative of the Association of Students of Economics reports that the students themselves feel the need of some practice, and that work undertaken for this purpose is too unco-ordinated and short to be of any use.[3] A professor of law and economics [4] analyses that which the student may expect to derive from a Practical Year: he would learn

[1] Professor Jastrow, *Verein*, p. 21 ff. [2] *Verein*, p. 82 ff. [3] Ibid., pp. 86, 87.
[4] Fuchs, Tübingen, ibid., p. 93.

'the sheer difficulties of daily life, the realities with which he is not familiar without experience, especially if his family are professional people. He must participate in menial tasks, and somewhere be, for a period, a cog in the great machine, whether it is a handicraft, or industry, or agriculture—where, does not matter, it is enough that he participates somewhere . . . so long as he somewhere learns the nature of the frictional difficulties of real daily life and obtains a really deeper insight into the world of labour and for a time works *shoulder to shoulder with the mass of working-men*'.

Another suggests visits to economic and social institutions, properly explained, of course, lest the mind of the young student become confused instead of enriched and clarified.[1] An administrative official of wide experience in the training of referendars in the preparatory service [2] warmly recommended that the University course of study should be divided into two parts; one of elementary law and economics lasting two years: then two years of varied practice; followed by a final two years of study. For the administrative official was essentially a man of decision, yet the referendars who come under his charge were the least ready to take a decision.

'They believe', he said, 'that when they have once weighed up all sides of the subject, their work is at an end. I have been able to embarrass the Referendars in theoretical and practical training by asking them, after they had most beautifully reported upon the legal and material circumstances of a case: "Now, what will you do? How will you solve the problem? To whom will you write? In what manner will you write? Is there anything more to be done? How will you begin operations?" They were nonplussed, and realized that the difficulty begins precisely at the point where they thought the subject was exhausted.'

The only agreement indeed so far reached upon this vexed question is that something ought to be done to mitigate the ossifying effect of book-learning and lectures. The most general solution offered at the Assembly for the *Verein für Sozialpolitik* in Kiel, 1920, a very representative meeting whose proceedings I have been quoting and analysing, was much greater use of seminar work, discussions and practical exercises (papers, reports and so on) by the students.

The discussion leads one back inevitably to purpose of training. Is it learning that is required, or a quality of mind, difficult to define, but which roughly is ability to learn, judge and act? It is not knowledge, but manipulative, managing power, the recognition of the nature of the task, and the ability to devise and use the appropriate implement. The insistent droning of this antiphony could be heard through the whole discussion, and this is the capital contradiction which must be fought out not to the victory of either side, but to that compromise which will produce the best civil servant. Of this, I believe Professor Schumacher had the clearest understanding and his

[1] Lüders (a woman), ibid., p. 105. [2] Dr. Saenger, of Berlin, ibid., p. 173 ff.

words have the obvious stamp of the real. 'The need of actual researchers is always extraordinarily limited; the need of men, on the other hand, who, without being learned, have acquired real scientific self-training, is in a civilized nation constant and growing if it is not to be stunted.' In the schools the training must proceed upon the basis that everything supplies a problem to be solved. Science is an incessant struggle with problems.

'Only in such a struggle which is always renewing perception, can clarity, the preliminary condition of everything else—*and first of all clarity towards oneself—be won; that feeling for actual limitation which distinguishes expertness from dilettantism* and is always and everywhere the proof and sign of true education . . . and self-understanding gives us the possibility justly to match together our own powers and our self-constructed aim, and upon this basis only does clear intelligence of the outer world develop: and there develops also the strength to overcome successfully the mightiness of error and delusion; the instinctive certainty of feeling, to which true competence which remains conscious of its limits, may finally unfold.'

It is the mode of thought, the art and process of reasoning that is to be sought; of course, as applied to the whole economic and social system. And this will give a judgement how to remove the unfavourable and enhance the favourable. It is impossible for even the most informed economist to know all that there is to be known about economic life—it is too vast. 'Whoever wishes to use his studenthood to the best advantage, to keep the world open for himself, must acquire the ability to find his way quickly in all parts of economic life. This is and remains the main purpose for which we have to strive.'

A Liberal Education. This aim is, I believe, especially clear to English thinkers on this subject. It might be termed as a liberal education or character-training through the social sciences. Not so many voices were as certain in their tenor as Professor Schumacher's. The weight is still given to learning in Germany, but the tendency is in the English direction—a tendency in ideas strong enough one day to have effect—the tendency is variously expressed in words which differ from those quoted, but the purport is the same. For example: 'The decisive thing is a high and free conception of life. This truly broad-minded conception of life is the basic element, the condition and the finest fruit of science . . . it is the vocation of universities to evoke and promote this in young people.' [1]

The signs of a fuller approach to the time-honoured English method of choosing officials from those trained in the classics or mathematics schools are few and weak. Here and there a suggestion is made that economics must be more closely related to the general philosophical

[1] Nostitz, President of the Supreme Administrative Court of Saxony, op. cit., pp. 140, 141.

faculty.[1] The weight of opinion is overwhelmingly in favour of the social sciences—that is, Economics, theoretical and historical, Economic Geography, Economic History, the Economics of private industry, Statistics, Law, History. That is the clear and definite result of the development of opinion since the middle of last century. Neither jurists nor economists nor officials differ on this as the desirable aim. The work of the official will be largely political and economic, therefore he must learn to think by the analysis of historical and contemporary economic and political behaviour. This is stated with concrete certainty. The only difficulty that is felt is how far law must form part of the syllabus- and there is an almost unanimous agreement that some law should be learned--how much it shall weigh in the syllabus is decided differently by different people [2]; it is desired for its direct practical use and also as part of the study of the social arrangements of mankind. Law has therefore theoretically suffered a tremendous decline as a training-ground for officials, and as we shall see later practice has in part consecrated the claims of economics.

In the course of this discussion we have deviated from the time-method of analysis in order the better to weigh the significance of the conceptions revealed by Delbrück. Let us return for a moment to his study. He believes that after the student has passed through his preparatory period he should go to a special Academy in Berlin for special lectures, covering the period of nine months saved from service with the Courts. At the end of this post-graduate study would come the State Examination for established higher civil servants. Such an Academy should not be separate from, but attached to the University, since it is important to keep officials in the same spiritual atmosphere as the rest of educated classes. The administrator must know and be able to evaluate the intellectual streams of his time, especially at a time when the co-operation of officials and civilians is increasing. Some officials of special ability, designed for promotion to high and independent office, should have a further two years' training. This would be given in a special institute where the students would spend one year upon the history of Prussian policy, especially domestic, Prussia's relationship to the German Empire, economic affairs and concrete problems of representation and administration. Practical work would be done and educative visits made. The teachers would be members of the University faculties and high officials. A

[1] Dr. Seckin, Consistorial Councillor, and Prorector of the University of Kiel, op. cit., pp. 6 and 7.

[2] An eminent authority, Dr. Bill Drews, former Minister of State, thinks the knowledge of the law is necessary, because, in fact, the law limits the power of the official, however soaring his ideas. *Verein*, p. 55 ff. Cf. also his tract, *Verwaltungsreform und Berufsbildung der Volkswirte*, 1930. Drews was Minister of State in the Reich, is President of the Prussian Supreme Administrative Court, and Emeritus Professor in the University of Berlin. A man of vast administrative experience and services. His tracts on our subject follow the argument we have been analysing.

second year ought to be spent in an agricultural, commercial or industrial situation. German thought on the subject of recruitment of the higher Civil Service has not pressed beyond the ideas so far analysed. Discussion proceeds and questions of detail are raised in its course. It is not worth pursuing this elaboration of the essential ideals.[1] It is of more value, first, to observe the practical changes which have most recently come about and, secondly, to sum up the course and significance of German experience.

Recent Changes. The Constitutional revolution of 1919 gave an opening for the introduction of changes in the recruitment of the higher Civil Service and these changes were based upon the development of opinion since the coming into operation of the Act of 1906. The main changes were indeed accepted in the Prussian Diet with hardly a dissentient voice.[2] Thus the Act of 1920[3] amends that of 1906; it leaves the basic lines of that Act fundamentally undisturbed, but modifies them in respects which are calculated to have an energizing influence upon the Service in the future. The preparatory service is reduced from four to three years.[4] The preparatory service begins with judicial service of only six months.[5] We need not stop to ask why these changes came about, their reasons are sufficiently written in the history of opinion. An alteration as significant as these was produced by the reform of the Law Examination which all law and administrative students have to take as a preliminary to the judicial and administrative services.[6] The history of the reform is of interest. Since 1910 Prussian Ministers of Education and Justice had attempted to bring about a reform with the advice and in agreement with the faculties of law at the Universities. In 1920 the University of Halle, whose faculty and students had previously played a large part in the movement for reform, called a session of delegates from all the German legal and political science faculties in obedience to a request of the Prussian Ministers for Science, Art and Education. Parliament pressed for a reform, and the criticisms and critics with

[1] Brück in his *Ausbildungsproblem* thinks the best step to take is to make the Diploma of National Economy (*Diplomvolkswirt*), set up in 1923, the academic training for civil servants. This would sever the connexion between the civil servant and the lawyer, and change the character of the training into one in which law would be a subordinate of economics and political science. This course would be followed by a period of practice in private, semi-private, and public authorities. So also Drews, op. cit., in *Staatsreferendar* and *Staatsassessor* (Jena, 1927). A number of industrial, Civil Service and University leaders seek to discover the best training for a uniform type—judge, lawyer, civil servant, private economist. They desire three and a half years' academic study, and two and a half years of preparatory service.

[2] Cf. Wandersleb, op. cit., p. 13. [3] 8 July 1920 (*G.-S.*, p. 388).

[4] Clause 3. [5] Clause 4.

[6] Cf. especially *Die Juristische Ausbildung in Preuszen* (Berlin, 1928), composed in the Prussian Ministry of Justice; and David, *Rechtstudium und Preuszische Referendarprüfung*, 1928. Cf. also Weinmann, *Die preuszische Ausbildungsordnung für Juristen*, Berlin, 1927. These are the collected statutes and orders, with commentary.

which we are so familiar were recalled in its debates, more especially in the discussions in the Educational Commission of the Assembly.[1] The immediate result was the regulation of the First Legal Examination.[2] In the written examination about one-quarter of the time is now definitely given to Constitutional and Administrative Law, and in the oral, which lasts two days, one day is given almost entirely to Economics and Political Science.

Other Institutions seek to carry out the intentions of the statute to the best possible advantage of the administrative official. The judicial term is served as before in a small court of first instance (the *Amtsgericht*). The preparatory service of two and a half years is spent in much the same way as before, with shorter stages.[3] Finally, the appointment of certain officials to be the mentors of the Referendars (which began in 1906 and proved itself a successful arrangement), has been followed in practice by an extension of their activities. They are given special leave to attend the lectures of the Institute for Further Education in Political Science, and they meet together at this Institute for discussion of their problems.

Survey of German Experience. 1. At the beginning of the nineteenth century there was a change in the training of Civil Servants: from the group of economic sciences collectively called Cameralism the weight was put on the study of Law. This gave satisfaction for a time, because the State modified its previous positive attitude and served by policing and emancipating.

2. Environment and ideas changed under the influence of the industrial and commercial revolution, and the study of law as a training-ground for administration was found wanting.

3. In place of Law what may be called Neo-Cameralist studies—that is, the Social Sciences—assumed the predominance in opinion, and the legislation of the twentieth century has accorded them an important place in practice. It is agreed, too, that the Social Sciences should include some law, mainly Public Law, but there should also be attention to the elements of Private Law.

[1] Cf. Drucksachen der Preussische Landtag, 1. Wahlperiode, 2. Tagung. 1921/1922, No. 2788.

[2] Ausbildungsordnung, 11 August 1923. Cf. Weinmann, op. cit.

[3] Cf. Statute, Clause 6, and Ausführungsanweisung, 15 November 1923, Clause 4: With *Landrat*, ten months, *Regierungs* and *Bezirksausschuss*, ten months; State or local police authority, three months; Financial Department, three months; and the surplus four months at the discretion of the *Regierungs-Präsident*, but the law stipulates a local government authority. A ministerial minute recommends practice in urban local government, and as far as possible the opportunity of independent deputizing for the *bürgermeister* or *Landrat*. 'In all cases,' says Clause 7 of the minute, 'only such authorities under the jurisdiction of the *Landrat* should be chosen in which there is available a thorough initiation of the referendar into the administrative service, close psychological contact with all classes of inhabitants of the *Kreis*, and the awakening of social understanding.' A Ministry of Finance Minute of April, 1924, indicates the particulars of the financial training of a referendar.

4. A period of preparatory service was always a part of the training: its value is definitely established by experience. It is applauded by everybody concerned. When differences arise they are upon the question of whether any time, and how much, should be spent in private industry. Practice with the local authorities and the local self-governing authorities is of capital importance in the modern State which cannot dispense with local government, and where proper co-operation between the centre and the locality may make all the difference between good and bad government—in terms of the satisfaction of the people and the economy of means.

5. It has been found that University training may easily result in administrative sterility. The safeguards against this are vital teachers, and methods which impress the students with the practical importance of their work, and which inspire the student to co-operate with the teacher in the mastery of a task and the solving of a problem. This first: then come adjuncts to book-study, like occasional visits and practice.

6. It is desirable in the highest degree to set administrators to work, on their own responsibility, at the earliest possible age. For the best training for life is life itself. The German method is criticized as devoting too long a time to preparation.

7. The discussion of the place of law in the training of Civil Servants has produced a secondary discussion: the place of economics and political science in the training of lawyers and judges. The result, in theory and practice, has been important, since no one qualifies as a lawyer for the first rungs of the ladder to the Bench without some University training in these subjects.

8. Germany has had an extremely long and continuous history of interest in administrative efficiency. The interest is an illustration of her political character, and her psychology in politics could be written by deduction from this as a major premiss.

CHAPTER XXXI

ENGLAND: ORIGINS, REFORM AND RECRUITMENT

ORIGINS

IN what respects does English differ from Continental administrative history? In this discussion it is wise to omit any account of psychological differences since the evidence we possess of the nature of these differences shows that the English mind and character were said to be very widely different in different centuries, and certainly the Englishman would not find his own view of himself absolutely accepted by foreigners. We may leave these vague elements for discussion elsewhere. The ordinary English view of to-day is that England was saved from bureaucracy and centralization, with which the Continent is afflicted, by the innate individualism of its people, their stout resistance to the interfering propensities of all government, and their ability to adventure and attain their own well-being by independent enterprise. But these words hide more than they reveal. Perhaps the real cause of freedom from bureaucracy is religious and social indifferentism and material acquisitiveness. Let us turn from the hypothetical to that which is historically well founded.

The first striking feature in English administrative evolution is the small amount of conscious, or at least formal thought bestowed upon the subject until the end of the eighteenth century. It is impossible after the reign of Henry III and his immediate successors to find a person of the mental calibre and strength of character of Richelieu, Colbert, Louis XIV in France or the Hohenzollens of the late seventeenth and eighteenth century in Prussia devoting themselves with such ardour to the creation of a complete social scheme and an administrative system to support it,[1] for Thomas Cromwell, Francis Walsingham, and William and Robert Cecil were restrained by imperious masters and a restive Commons. Whatever of administrative inventiveness there was went mainly into the organization of

[1] The early history of administration is, of course, hardly distinguishable from constitutional history, since the administration revolves immediately around the King, himself an active administrator at the centre. For this history see Stubbs' *Constitutional History*, and Petit-Dutaillis, *Studies and Notes Supplementary to Stubbs* (1914).

the Treasury,[1] and the Chancery, the development of the Royal Council,[2] and only lastly the Secretaryship of State.[3] English needs were not those which required for their satisfaction the extreme centralization and hierarchies of the Continent. Before the sixteenth century the modern State had hardly yet arisen out of feudal organization, and this provided for so much of the official work in its own peculiar fashion, in the manor, the corporations and guilds, and by the clerks, the Church-learned dignitaries and minor writers. The Chancellor and the Treasurer and the royal clerks who surrounded the King were his private servants. They did not come under external criticism until much later since their work was at first so slight and their power so unpolitical, that it did not cause public anxiety. When, in the sixteenth century, the nation became conscious of its identity, international and domestic, and the Tudors had raised the power of the Crown to a great height, the monarchy and, by consequence, its Ministers were faced by a restive Parliament at the centre of administration and by about two thousand Justices of the Peace and thousands of Parishes at the extremities.[4] That is, at the centre its pretensions and plans were subject to a valid external check,[5] and the privy councillors in Parliament were harassed and checked when they attempted the high hand. Nothing like such a powerful and authoritative control over the administration existed elsewhere in the Germanic States or in France. In this respect England was a century and a half in front of them. This was a very important factor for the extent to which it limited the size, pretensions, and quality of the administration. In the localities there was a ready-made administrative apparatus which cost little or nothing.[6] When men like Burghley—no longer royal servants and clerks, and since about 1601 given the significant title of Secretary of State—began to pursue a positive State policy in relation to industry and commerce they relied upon this local machinery.[7] But what costs nothing usually

[1] Cf. Hall, *The Red Book of the Exchequer*; Poole, *The Exchequer in the Twelfth Century*; Tout, *Chapters in Mediaeval Administrative History* (4 vols.).

[2] Baldwin, *The King's Council in England during the Middle Ages* (1913); and see further, Turner, *The Privy Council* (3 vols.); Andrews, *British Committees, Commissions and Councils of Trade and Plantations*, 1622–75; and Thomas, *Notes on the History of Public Offices*; also the historical introduction to the volumes in the *Whitehall Series* (Messrs. Putnam).

[3] Cf. Dibbens, *English Hist. Review*, 'The King's Secretaries in the thirteenth and fourteenth centuries,' XXV, 430; and most importantly the excellent study of *The Secretaryship of State*, 1558–1680, by Evans.

[4] Cf. Beard, *Early History of the Justice of the Peace*.

[5] Cf. the distinction made between the will of the monarch and that of the Secretary: e.g. Andrew Marvell, on the occasion of the resolution that Secretary Williamson be sent to the Tower (Nov. 1678): 'The King's very prerogative is no more than what the law has determined. . . . Whatsoever excesses are committed against so high a trust, nothing of them is imputed to him . . . but his ministers only are accountable for all and must answer it at their peril' (cited Evans, op. cit., p. 142).

[6] Cf. the studies of local administration by Mr. and Mrs. Sidney Webb.

[7] Cf. Chap. III, *supra*.

gives nothing after the waning of the first excited patriotic impulse, and Parliamentary Colbertism as it has been called, or Mercantilism, petered out and ultimately did more harm than good because the administrative instruments, indispensable to State activity, had not been consciously devised by reference to the nature of the law to be applied. This lazy hand-to-mouth method is apparent in every branch of national administration. The ends were desired, but not the means which alone could have attained them. An attempt was made at the end of the sixteenth and the beginning of the seventeenth century consciously to invigorate the administration of the Poor Law (which was the core of local administration), and when it failed the sun set on such efforts at administrative efficiency, not to rise again for two centuries. Continental thinkers have expressed their admiration of England's freedom from bureaucracy, and this admiration has been focused by the works of one great worker—Gneist—upon English local administration, the nature of which in the seventeenth and eighteenth centuries preserved the country from centralization. Whether this boon has been entirely unmixed is a question we are not called upon to judge. But Gneist's contention is not without much truth.

The administrative apparatus of England from the middle of the sixteenth to the end of the eighteenth century worked so badly as to call forth law after law from the central authority, each complaining that the preceding one had not been properly executed. The preambles to these laws were compounded of complaints, scolding and exhortation. It is impossible to estimate in quantities the financial loss and the physical and spiritual misery suffered by the people of the parishes and the towns of England because there was no central officer to watch and control the behaviour of the local authorities. It was enormous and terrible. And the comparative study of administration convinces one that a large proportion of it could have been avoided by a central bureaucracy, even after allowances have been made for the universal brutality, roughness and venality of governments. The researches of the Webbs and others have taught us the painful meaning of the 'good old days'. However, the hierarchical, centralized, over-disciplined system of Prussia was avoided, and the detailed *étatism* and organized venality of France found no place. Instead, there was much that made for the development of administrative self-reliance. The laws made by Parliament were carried out not by the professional agents of the central authority, but by the local gentry of the middling class. These were unpaid and non-professional. No qualifications of literacy or study were required of them. The conscientious among them could acquire the modicum of law necessary for their decisions from the Justice's manuals and the customs of others. Their reasoning and judge-

ments were not directed by authority; no excessive numbers of regulations or minutes hampered them; and no representative of the central authority supervised their activities. The authority they exercised appeared unstrained and natural to the mass of men, for the Justices of the Peace occupied their positions in virtue of their economic fortune and social status. They were the landowners and therefore, in an agricultural society, the hereditary rulers. Their acres prevailed. As neighbours their rule was accepted with the minimum amount of questioning we accord to one of our own group. It is the 'outsider' whose presence raises questions and whose pretensions conduce to discussions of their justification; the 'outsider' it is who provokes the democratic *quo warranto?* The Justice of the Peace was not one of these, interfering in the name of the King or the Queen, or the State, but simply settled the everyday difficulties of two or three villages—and in partnership with his fellows, at Quarter Sessions, settling more important questions of order, roads and bridges, the well-being of the poor, prices and wages, and such-like affairs for the benefit of the county. Quarter Sessions had a few officers—but for the rest, the everyday work of administration was done by even more immediate neighbours of the governed, the Parish officers.

All these officers were directly of the people, serving for their term compulsorily, and often unwillingly. They knew vividly, and in detail, the nature of the life of their community, and when they desired, did not find it difficult to distinguish the circumstances of one person from the other. Moreover, the people knew them just as well. Accommodation of governors and governed is of the first importance in successful and liberal administration: and this, mutual knowledge rendered easy of attainment. The opinion of the governed promptly and continuously influenced the governors—sometimes too easily as in the removal of nuisances, the relief of the poor, the reduction of assessments for rates. Nor were the purposes and motives of the administrators remote from the people.

This was clearly a system in which the habit of self-government was fostered, at least for the aristocracy and squirearchy, and in which the legend of immemorial right of local government could develop vigour and stamina. The sense of freedom from external direction and control was not disturbed by the actual machinery which brought the central government and the local officials in town, county and parish into the semblance of loose coherence. It was non-bureaucratic, that is, it was not exercised by officials trained for work in a particular department of State and with habits of mind formed by professional activity in those departments.

It was judicial, exercised by judges, their minds formed in the practice of a profession which, in England at least, at that time, gave daily opportunities for a wide acquaintance with men, interests, and

policies. For the processes of administration had not in the seventeenth or eighteenth centuries been so clearly as now distinguished from the administration of justice, and the development of the Commission of Justice of the Peace had made him, in his legal capacity, an administrator. Quarter Sessions was the ultimate local legal authority and administrative authority. The recalcitrant parish, as well as the negligent officer or inhabitant, could be 'presented' before the Sessions, and the judgement of that Court was equally a punishment for past behaviour and a command for the future. It was a curious and almost unparalleled system, and it operated not inefficiently until the acceleration of men's activities and the altered scope of new needs at the end of the eighteenth century made it impossibly cumbrous and inexpert. It could only be sufficiently expert when the neighbourhood over which it ruled was small enough in the area of its interests, if extensive in the area of its territory. This queer legal-administrative procedure brought almost the whole range of administration within the purview of the King's Bench. The parties to legal-administrative disputes before the Sessions—for example, about the apprenticeship of a pauper child, the administration of a House of Correction, the assessment of rates, negligence in the removal of nuisances (not such a frequent cause of action in the days before the real causes of public ill health were known) responsibility for the upkeep of the bridges and roads, and scales of wages and prices the parties to these disputes could appeal to the Judges on Circuit, and the decisions of the latter were law, that is to say, the lines upon which administration was to proceed in the future. In the next edition of the Justice's Manual rights and duties would be expressed in terms of these decisions. Further, the Justices went beyond the immediate issues of the case as between Overseer Johnson and the Sessions, or the Parish of X and the Court, and commented upon the general and public interest involved in *obiter dicta*. Their judgement and *obiter* were informed by the wider, more national-minded view learnt in Westminster, and indeed their close contact with the Privy Council, resulted in a continuous interchange of opinion in which the Privy Council learnt of the state of administration far afield and the Judges learnt the desires and intentions of the Privy Council. The whole history of the development of the machinery and principles of local rating, for example, is a history of legal decisions.

Yet it was necessary that cases should be brought to the Courts if the courts were to exercise an influence. It was possible under this system that maladministration should continue, without 'presentments' taking place. Whether there should be 'presentments' depended upon (*a*) the public spirit of the locality, and (*b*) arrangements to cause neighbours to be 'disloyal' to wrongdoers. If these

were lacking then the assizes could still be held, but without accomplishing much.

There is no way of appreciating the level of public spirit of the locality. Both the history of public health administration [1] and of poor-relief teach us that there was much kindness, but also a shocking amount of ignorance and callousness to public sights, sounds, smells and misery which one would to-day imagine belonged only to some far remote and horrible Dark Ages. Knowledge, means and incentive are the indispensable conditions of social amelioration; and until the last quarter of the eighteenth century both the town and the country-side were woefully poor in all three. For knowledge there was pitiful ignorance; England was not rich, and incentive, for some, still awaited the impulse of religious revival and, for others, the Enlightenment. We can only answer the question how much public spirit was there in the locality, in this wise, inductively. The great English 'muck-raking' period 1780–1842, showed retrospectively the lowness of its level. It was indeed essential to make arrangements for the organized 'disloyalty' of neighbours. The means was simple. It consisted in the stimulation of cupidity: part of the prospective fine was offered to any person who acted as 'common informer'. The 'common informer', indeed, was the unprofessional amateur agent of the central authority. Many English statutes contain clauses offering rewards to these neighbourly people.[1] It is not possible to say how far this means was effective. It deserves a close research. I doubt whether it made any appreciable difference to the value of English public administration. The locality was too small a place, and mobility too restricted for any one to take the social risks involved in information. But it may (as many institutions do) have operated silently as a possible risk to those entrusted with public functions who were acting negligently or *ultra vires*. It is one more of the many silent comments which the actual statutes of the realm make upon the phrase, 'An Englishman's home is his castle'.

There was no bureaucracy, and when the tension of administrative need was slack, the system pursued its humdrum, incompetent way. The local officials were continually but weakly lashed into activity by new Statutes. These went into detail, and the details were accumulated by the quick succession of unending Statutes passed because administrative difficulties were reported of the previous laws and because new means of control were being discovered. The best available examples are from the field of poor-relief, because this was pre-eminently the field in which the English State expressed its collectivist nature. The Poor Laws were at once the police and labour-market legislation of those centuries. Year after year additions were made to the machinery of administration—or at least to the legal

[1] Cf. Creighton's *History of Epidemics*; Simon, *English Sanitary Institutions*.

clauses commanding the creation of the machinery. But to command is not enough, and in the end Crown and Parliament were forced to threaten the Justices themselves with fines. Indeed, *quis custodiet ipsos custodes?*

Attempts at Central Control. One determined attempt was made to send a current of energy through the machinery from the central source, and its history is instructive. It was the direct outcome of the need to make the Poor Laws ameliorative and not merely oppressive. The terrible distress and misery of the 'nineties of the sixteenth century caused the quickening of the central government's interests in the administration of the Poor Laws, and Burghley's administrative energy united with the feeling of the two Houses of Parliament and their leaders like Bacon, the Cecils, the great lawyer Coke, Archbishop Whitgift and other ecclesiastical leaders, to create the engine of central direction. In 1587 Burghley had already drafted a long order commanding the Justices in detail to undertake a wholesale campaign to alleviate the famine by equitable distribution of all available foodstuffs, and to set the poor on work.[1] The Justices were required to transmit reports of the situation in their localities and the action they had taken. The commission of the Justice of the Peace was altered to include a wider definition of duties than before.[2]

In 1595 a special address was made by the Lord-Keeper to the Justices of London and the Home Counties at the Star Chamber—they were charged to do the work imposed upon them by Statute and Orders, in detail and 'with a Herculean courage'—and were threatened with withdrawal of their commissions if they disobeyed. The ecclesiastical power was called in- -on holy days the Bishops and the clergy preached to the administered and the administrators. Explanations of the Statutes were issued to the Justices, who were enjoined to enforce them.[3] Judges' 'expositions' of the law were circulated in 1601. In 1603 evaders of the poor-rate were threatened with action before the Council. Then followed a stream of Orders from the Privy Council to the localities, prescribing the duties of Justices and ways and means of their execution. The bad local machinery—the lack of regularity, system and practicableness leading to diffusion and loss of responsibility—was specially singled out for attack in 1609,[4] the 'want of good correspondence between direction and execution' was indicated. The whole country and parts of the country received alternate attention. In 1620 a special commission was set up by the Privy Council to occupy itself with getting the Poor Law enforced—Orders and Proclamations followed. In 1630 'Com-

[1] For this and the following account cf. E. M. Leonard, *Early History of English Poor Relief*; Webb, *English Poor Law History*, Part I, *The Old Poor Law*, Chap. II
[2] Cf. Beard, op. cit., pp. 141-3 and 168–71; cf. also Prothero, *Select Statutes*
[3] Leonard, op. cit., pp. 143, 144. [4] Webb, op. cit., pp. 74–5.

missioners of the Poor' consisting of members of the Council were established. Its sub-commissions dealt with special localities. It prepared the 'Book of Orders', published in 1631—

'Orders and Directions, together with a Commission, for the better administration of justice, and more perfect information of His Majesty, how and by whom the Laws and Statutes tending to the relief of the Poor, the well-ordering and training-up of youth in trades, and the Reformation of Disorders and Disordered Persons were executed throughout the Kingdom. . . .'[1]

For some years this Book which was widely circulated in pamphlet form was the code of Poor Law administration. Its main instructions related to the machinery for local government, the Justices were to divide and assume responsibility for particular hundreds, they were to hold monthly meetings and to confer with the constables, churchwardens and overseers, to discover what had been done and who had offended against the law, to punish neglect, and report every three months to the Sheriff. Such reports were to go to the Judges of Assize and then to the Lords Commissioners. This period of central activity is thus summed up by its most recent historians:

'There was, in fact, from 1590 to 1640, what is not found in English history before that period, or after it until the establishment of the Poor Law Commission in 1834, an almost continuous series of letters, instructions and orders, emanating from a central government department, in the names of the Privy Council or some members of it, either to the Assize Judges, or the Lord Lieutenants or High Sheriffs of the various counties, or directly to the Justices of the Peace in Quarter Sessions, insisting that the statutes for the relief of the poor and of maimed soldiers, for the maintenance of tillage and the repression of vagabondage, for the regulation of alehouses and of the sale of ale and bread, and the repression of recusancy and crime should be put into operation. . . . We gain a vision, between 1590 and 1640, of a group of vigilant and indefatigable Privy Councillors, wielding unquestioned authority irrespective of which monarch sat on the throne, and constantly in receipt of information from all parts of the country. . . . What the successive great officers of State were establishing was, in fact, a mighty organized system of Local Government, co-extensive with the Kingdom, with a regular official hierarchy, based upon just the amount of centralization required to ensure that the administrative machinery was everywhere working according to plan.'[2]

The attempt failed. For the Civil War broke down the connexions between the central and the local authority, and perhaps that war was in part caused by the resolute attempt to bring the localities—which means the local gentry—under the control of central Executive. The aftermath of the attempt was a state of anarchy in which the destitute, swollen in numbers by the consequences of the War, lived and died in cruel misery. 'At this day', said Sir Matthew Hale about 1659, 'it seems to me that the English nation is more deficient in their prudent provision for the poor than any other cultivated and Christian State.'

It is clear that the machinery was wanting. Had the whole Privy

[1] Eden, *The State of the Poor*, 1797, I, 156–60. [2] Webb, op. cit., pp. 78–9.

Council been able to transport itself everywhere and every day to the localities, and to give their orders and injunctions every moment that the ardour of the Justices and Overseers showed signs of failure, their orders and injunctions would have been worth more than the paper they were written on. For it is not enough for an organ of the State to will, the will must be embodied; for administration requires continuity of incentive, and, therefore, ultimately, officials specially engaged with a continuously provided inducement to obey. It was long before this was understood, and consequently no attempt was made to provide payment for all that officialdom outside London and not directly employed by it, and called then not local government, but 'the subordinate government of the realm'. Dr. Burns has the distinction of being an early observer of the need for professional service in that branch of public administration with which so many others were fused—poor-relief.[1] The clerks in the nascent departments of State—the Treasury, the Customs, the Navy, the Army Offices, the Secretary of State, the Post Office, small in number and with duties as yet insignificant compared with those of to-day were paid—but in curious ways, largely by fees and perquisites.

The country was, in fact, in the seventeenth and eighteenth centuries, more concerned to control the Executive as a policy-making body than as an administrative organization. It was not anxious to seek and tap the sources of efficient government, but to limit the power to govern without Parliamentary consent. Since the Crown sought only amenability to its wishes it was not a ready instrument for the research of means to enhance the capacity of subordinates in its service. Its Ministers and Secretaries recruited without any publicly stated principles, and underlings increased or decreased in numbers as the sources of fees were increased or decreased. Parliamentary sensitiveness to a challenge to its independence and controlling power and the Crown's desire to obtain a hold over members by the judicious distribution of offices caused a clash between them. The judicial constitutional struggle is well known; the administrative aspect of it was the long succession of Place Bills.[2]

Perhaps the most important effect of this movement was the growth of the theory of the separation of powers and its repercussion upon the nature of the American Constitution.

English Preoccupation with Parliament and Colonies. Thus, while the Continent in the seventeenth and eighteenth centuries elaborated an administrative system professional in its training and appointment and carrying out the positive work of the State, England devoted its energy to the establishment and perfection of constitu-

[1] *History of the Poor Laws*, 1764.

[2] Cf. Lecky, *History of England in the Eighteenth Century*, Vol. II, 61; Todd, *Parliamentary Government*, Vol. I, 243 ff.

tional restraint upon the power of the Crown. While the Government was at times *étatiste* in principle, it was *fainéant* in practice. English needs were not those which could be satisfied by a bureaucratic system: whereas Prussia and France had their eyes turned inwards upon their own territory, whereas 'inner colonization' and the fostering of domestic industry were century-long activities of the government in those countries, England's eyes were directed outwards to colonies and commerce beyond the seas. Naturally she made the instruments, very effectively indeed, to accomplish her desired destiny in these directions—a fighting navy, a mercantile marine and the trading companies. Prussia and France themselves were exploited by their bureaucracies; but England was fortunate in having needs which involved only the exploitation of foreign peoples. The tyranny which rankled in the breast of the French peasant was expressed at home. Only a Burke, in England, could make the tyranny of the Nabobs public. But domestic England was spared the tyranny of bureaucracy. Her localities remained free to practise or omit the rules of a good social life until a time when the development of communications made the whole nation one locality, by which time, too, the freedom from central control which had largely been an accident of history had become so much a matter of course, that the new claims of the central authority were challenged as violations of 'immemorial rights'. In France and Germany the balance of social forces was maintained by a monarchy and its officers ramifying everywhere: in England the gentry maintained the balance of social forces in Parliament and by their presence in the County. Their reign may have been milder than that of the Intendants and the Commissioners, but it was equally *de haut en bas*, and from the people it brooked no nonsense.

This non-centralized, non-bureaucratic system of government was in part made possible by certain accidents of geographical position and historical fate. The comparatively unchallenged supremacy of a single political authority was accomplished as a result of the Norman Conquest—that is, five centuries at least before such a boon was gained by either Prussia or France. The energetic conquerors, with a remarkable genius for administrative consolidation, laid the basis of a peaceful and unified political order.[1] The spirit and tradition of the Norman *vicomte* impressed the ancient English sheriff as never before upon the great but inassertive chaos. Where defenders raised their heads a ruthless massacre cleared the way once and for all for the writ of the Conqueror. Nor was the Conqueror to be robbed of the sole exercise of power by any such feudal or family arrangements as in France kept private and civil war endemic till the seventeenth century. All William's partners in the Conquest held directly from him, there was no subinfeudation to rear up great rival chiefs with

[1] Cf. Haskins, *The Normans in European History*.

loyal followers, and the King broke the power of his Barons by breaking their estates into several parts scattered all over the country. This secure unity, this composed State has, of course, its remarkable expression in Domesday. Nothing like it was known for centuries in Europe.

Centuries before Europe, England had swept away the greatest obstacle to the development of local government: the potentiality of anarchy. It is only the secure and certain power which can afford to make enduring concessions. Where the centripetal forces are strong they beget a fierce reaction; and the potentiality of anarchy has always driven the central authority beyond the normal needs of centralization. Compared with the Continental countries we have discussed, England was fortunate in being conquered and governed by a system in which anarchy was out of the question, and in which, therefore, the localities were spared the assertion of sovereignty by the iron hand of a central council.

No Need for Discipline. In geographical situation, England was favoured, too: insular and isolated, invasion became difficult once a navy had been built for defence. Its territory does not mix indistinguishably with the territory of jealous neighbours. It is not surrounded by different powers, of whose varying policies it must take account. It was for long able to think, if not yet to sing, 'confound their politics'. Having little to fear it had not to make preparations or be upon the *qui vive*. Therefore, it did not need to insist, as Prussia and France have had to do, that the country must be one and undivided. It was unnecessary to knit the country together with a thread of steel whose ends were in the hand of the central authority. Neither conscription of individual persons nor localities was necessary. The doctrine of the *raison d'état*, which, equally with the doctrine of benevolent despotism, logically conduced to centralization, was a Continental doctrine in origin, and arose in those countries, in the Italian States, Spain, France and Prussia, where neighbours were on the prowl, and conquest and defence were the daily anxieties of statesmen. The sea saved England for long from the centralization imposed by the *raison d'état*, and when the doctrine of benevolent despotism arrived at its fruition the lack of a bureaucracy caused its influence to be slight. Then, also, England was less under the influence of Rome in the matter of law and religion. Though many of her great scholars were taught in the law schools of Italy in the twelfth and thirteenth centuries, her distance saved her from participating in the 'reception' of Roman law, she had no place in that ponderous body, the Holy Roman Empire, and the development of Common Law principles was inimical to the gospel of centralized monarchy with which the Roman codes furnished royal lawyers like Bodin. Distance, too, had prevented the full influence of ultramontanism from penetrating the country, and it was easier to shake off alien pretensions to

rule, without the engorgement of the power of government to the dangerous extent necessary in France and Prussia.

Survey. In the late years of the eighteenth century, then, England possessed an administrative system which could be described as decentralized, non-professional—save for the Whitehall officials—non-bureaucratic, liberal, with a dispersed and incoherent arbitrariness. It was, with occasional exceptions, but moderately competent; and not infrequently dishonest. Its authority in the localities reposed upon the economic and social power of the local gentry and aristocracy and the dumb conformity of villagers. Much of its efficiency came from the opportunities and the sense of neighbourhood. At the centre its authority was limited by Parliament, though in the hands of George III and through his tactics the limits were drawn widely. For none of the officials were publicly stated and objective standards of administrative efficiency laid down. It is obvious that the changes which were then in germ and soon to mature must eventually overthrow this system: the change in the sources from which men obtained their livelihood shifted the centre of power which comes from the possession of means; some parishes became depopulated and lost the indwelling neighbours, others became so thickly populated as to extend the neighbourhood infinitely beyond the eye and brain of a Justice or an Overseer; new means of transport changed the meaning of 'locality', new science changed the connotation of 'individual'; riches, religion and the doctrine of Progress slew fatalism and gave wings to the hope of social regeneration; machinery filled men's minds with the daily wonder of regularity, control, inventiveness, quantitive exactness; and the vessel was imperceptibly, but rapidly, modelled to fit its new contents.

However, a deliberate, intense, and even violent campaign was required before the old order was overthrown and the foundation of a new one laid. Administrative reform was bound up with constitutional reform: no real progress in the former was possible without the collapse of that which had been England's glory—the sole rule of landowners and squirearchy in Parliament and county. It was after the Reform Bill only that the bulwark between the new social forces and administration was thrown down. Prior to 1832, however, the practical activity of Burke and the philosophy of Bentham attacked the foundations of the old edifice, and the *first* human portent of a new race—Sir James Graham—began the work of reducing patronage and making appointments according to merit, to the horror of his political friends.[1]

No complete record exists of all the offices for which public money then paid the salaries, nor can it exist, for many were sinecures and occasional services. Obsolete jobs still retained their names and

[1] Cf. Parker, *Life and Letters of Sir James Graham*, passim, but especially Vol. I.

fees, the labour having long departed. There were, just before the end of the eighteenth century, about 300 officials of high and subordinate class in the central offices, and several thousands—about 14,000—of Customs and Excise jobs, and local postmasterships scattered throughout the land.[1] All these were the subject of political chaffering, and the calculated incomes for one's children. The offices had become so much the currency of politics that the market dealt even in 'futures' and those who could not immediately be bought over by immediate deliveries were consoled with 'reversions'. 'Reversions', that is, the prospects of office, were literally bought and sold. The Grenvilles appointed relatives at the age of four to the reversion of clerkships in the Privy Seal Office, and George Grenville knew that he was sinning, for when Lord Mansfield said that 'Parties aim only at places, and seem regardless of measures', he answered, 'The cure must come from a serious conviction and right measures, instead of annual struggles for places and pensions.' But who first should suffer the pangs of acquiring a 'serious conviction'?[2] Sir Robert Walpole gave his son, Horace, the leisure to savour the literary seductiveness of the Parisian *salon* at the expense of Clerkships and Collectorships paid for by the nation. 'Endowed', says Horace, 'so bountifully by a fond parent, it would be ridiculous to say that I have been content.' Those with the highest salaries rarely looked inside their offices. Those with the small salaries were fearful of a change of ministry: 'Five hundred and thirty placemen went in and out, up and down, between the great Commoner's resignation in 1761, and Lord Chatham's resumption of power in 1766.' Ireland and the American Colonies were the happy hunting-grounds of absentee salary-takers.

However, it is enough to refer the reader to the works of Trevelyan and Namier, the latter especially,[3] in which the heartrending shrieks of the impending victims can yet be heard. The development of the Parliamentary system by an aristocracy not answerable to the people had brought the country to a tragic pass, when the only qualifications for office were political subservience, family relationship, boon companionship and ability to absorb brandy and port. It needed the patriotic eloquence of Burke and the reformatory Whigs, the smarting loss of the American Colonies, the ferment of the French Revolution, the rise of utilitarianism, and the revolutionary years of 1830 to 1832 to make a breach with the days when Cowper said:

> 'The levee swarms as if in golden pomp
> Were charactered on every statesman's door,
> "Battered and bankrupt fortunes mended here".'

[1] A complete return is made in a Parliamentary Return of 1828

[2] Cf Trevelyan, *Early History of Charles James Fox*, Chap. III.

[3] *The Structure of Politics at the Accession of George III*, 2 vols., 1929.

REFORM

The Departments of State are largely the creation of the last one hundred years, and they have increased in numbers and personnel particularly since about 1870.[1] This is easily understood. The Industrial Revolution compelled society to equip itself to meet new material obligations on a vast scale; health, poverty, education, communications, trade, agriculture, colonies, manufactures, now disclosed elements which demanded large-scale regulation and compulsion. The political philosophy of the Utilitarian school and the Tory humanitarians resulted in inquiry into these elements and to the adoption of the necessary measures. At first only the dead environment—drains, buildings, factories, roads—was to be altered, but it soon began to be seen, most vividly in the sphere of public health, that men were no less important parts of each other's environment. Consequently State activity spread wide and deep. Expenditure grew and the numbers and efficiency of Civil Servants increased. From 1832 onwards the numbers grew rapidly, and there is never a retrogression worth remark. But the expansion is not at a regular rate; it occurs by sudden spurts which may be correlated with the State's legislative and administrative assumption of new duties, or the expansion of already established services. The figures which follow were obtained from Parliamentary Returns up to 1832, and since then from the censuses for England and Wales. The numbers include all administrative and clerical staffs, messengers, postal officials; they exclude industrial staffs for which there is no data. The different bases of the censuses and the paucity of explanatory comment on the Civil Establishments make it impossible to offer more than the crude figures given. But they show the striking increase, especially since 1881.

Year	Numbers	Remarks
1797 [2]	16,267	
1815 [3]	24,598	Here began Parliamentary demands for 'economy'.
1821 [4]	27,000	
1832 [5]	21,305	
1841 [6]	16,750	'Exclusive of many persons who have returned themselves simply as Clerks, Messengers, etc., and many who are engaged also in trade.'

[1] Thus the Ministry of Agriculture was established in 1889, the Development Commission, 1909, Board of Education, 1899, the Local Government Board, now the Ministry of Health, 1871, the General Register Office, 1836 and 1874, Ministry of Labour, 1911, Department of Overseas Trade, 1917, Department of Scientific and Industrial Research, in 1919, and the Ministry of Transport, 1919. Every Department has been extended by tasks unimagined by the generation which died in 1900.

[2] and [3], Gretton, *The King's Government*, p. 111.

[4] and [5], House of Commons Paper, 12 July 1833, on Reduction of Offices. This title is significant of Parliament's attitude; but the House of Commons was not then anxious about 'bureaucracy'; it was troubled by the increase of expenditure.

[6] Ex *Occupation Abstract, in Accounts and Papers*, Session 1844.

Year	Numbers	Remarks
1851 [1]	39,147	
1861	31,943	
1871	53,874	Some workmen included, but how many not stated.
1881	50,859	Telegraph and Telephone Service not included.
1891	79,241	
1901	116,413	Great expansion in P.O. since 1891.
1911	172,352	Telegraph and Telephone Service now included.
1914 [2]	280,900	Includes Scottish and Irish Services.
April 1st. 1922 [3]	about 317,721	On the decline from the peak of war expansion. Excludes about 20,000 transferred to Ireland; includes Scottish Services.
April 1st. 1926 [4]	296,398	*Excludes 5,000 more transferred to Irish Expenditure;* includes Scottish Services.

We are served to-day by an administrative machine which, only in the last few years, is being converted from a planless improvisation into a well-ordered engine [5] both powerful and sensitive enough to satisfy modern needs.

From Patronage to Open Competition. The modern history of the British Civil Service begins in 1855. Up to that time, as we have seen, the offices of State fell into the hands of the ruling political party and were used to bribe and reward their followers. There were two periods of occupation with reform of the Civil Service. The first covered the years 1689–1855, the second commenced in 1855, and is not yet finished. In the first period attention was not directed towards improving the quality of the officials: the quest was not for aptitude, but mainly for the political purity of the House of Commons and the electorate.

The revolution of 1689 had given Parliament the supremacy over the Crown, and to safeguard this sovereignty Parliament determined to exclude from the right to its membership any official holding a place of profit under the Crown. The civil offices were thus a pawn in the struggle between Parliament and the King. In this way the mass of officials were and still are excluded from Parliament, and the later developments of this exclusion have opened up serious problems dealt with further on. Exception was made, of course, and still continues, of the Ministers of State. They are the link between Parliament and the Administration. Acts of Parliament went even further in the attempt to exclude office-holders from politics. In 1712 Postal officials of higher rank were forbidden to take any part in elections, but the majority of lower officials were still allowed to vote. In 1782, the very apogée of the corrupt sale and gift of offices, the campaign of Edmund Burke for Economical Reform, obtained a

[1] From analysis of Census figures, in Appendix to Report on the Re-organization of the Permanent Civil Service, 1854; Papers, p. 439. Vol. 13, p. 36.

[2], [3] and [4] Cmd. 2718: 1926. Memo on Present and Pre-war Expenditure.

[5] Cf. Sir Warren Fisher, *Evidence, Royal Commission on the Civil Service*, 1929, *p. 1267, paras. 3–6, Memorandum.*

partial success in a statute of that year. The Act of 1782 disfranchised customs, excise and postal officials, and this prohibition was maintained unto the year 1868. But entry to these offices was still used as a political favour. It is worth pausing here a moment to consider Burke's views. He was, perhaps, the first statesman to see the problem of the Civil Service as one of the efficiency of the administrative branch of government. His great speech of 11 February 1780 was entitled, 'On Presenting to the House of Commons a Plan for the better security of the Independence of Parliament and the Economical Reformation of the Civil and other Establishments'.[1] He said that uppermost with him

'was the reduction of that corrupt influence, which is itself the perennial spring of all prodigality, and of all disorder; which loads us more than millions of debt, which takes away vigour from our arms, wisdom from our counsels, and every shadow of authority and credit from the most venerable parts of our constitution'.

But he spent most of his speech on proving to the House how all the Departments suffered from 'the grand radical fault: the apparatus is not fitted to the object nor the workmen to the work'.

As in the history of local government and of most other English institutions of this period, there was a silent massing of the opposed forces of Utility and Patronage. We must not forget in this period the pioneer work of Jeremy Bentham. In his *Official Aptitude Maximized, Expense Minimized* (first published in 1830, but being a series of papers composed between 1810 and the later year) he lays down the general basis for a reform of the corrupt officialdom and rank patronage of his time. In his *Constitutional Code* (Book II, Chap. IX, Sect. v. *et seq.*), he constructs in detail a code of official appointment and pay which shows his inventive mind at its best. Readers may well turn their eyes to this fine piece of reasoning, which anticipated more than all of our modern methods of Civil Service recruitment and other conditions, and they cannot fail to admire Bentham's marvellous power of mind, though they may smile at some of the grotesque practical suggestions which follow from his philosophy of human nature. In 1849 the Permanent Secretary of the Treasury, Sir Charles Trevelyan, pointed out the defect of the Civil Service of his day: it was overstaffed, inactive, and incompetent, and people commonly considered the Civil Service as the last chance of a livelihood for young men who were too stupid to be successful in the open competition of the professions outside, and for the old who had already failed. A rule had been made by the Treasury in 1840, for all Departments, that 'clerks appointed to the principal offices should possess a competent knowledge of book-keeping by double entry'—but it was obeyed by

[1] Burke, *Works*, *World's Classics*, II, 303, seq.

nobody. Those people who made the Service a profession were habitually cheated out of promotion to the highest offices by the nominees of the powerful. But England was spared the great defect of the American 'Spoils' system—the rotation of offices—the product of a democracy over-suspicious of its executive, possible in a system where the Executive has a fixed term of four years, but not in a system of Cabinet government where Parliament can be dissolved and Ministers dismissed at any moment.

Reform was undoubtedly caused by the pressure of business on the Civil Service and the mental energy of the Utilitarian philosophy. The latter was already having its effect not only upon every aspect of government, but even upon the old Universities which were in the 'thirties and 'forties awakened from slothfulness, their endowments for scholarship now being competed for by examination. Indeed, Macaulay, the future reformer of the Civil Service, was a Fellow of Trinity by competitive examination. It was the age of the Machine and Engineering triumphs, and the Civil Service was perhaps now in men's minds taking on the aspect of one machine among many, to be renovated according to new needs. It was fast losing its dark semi-mystic character as part of the apparatus of sovereignty, although to this day its position in respect of legal liability has not been made to fit modern necessities. From the old system England was delivered by the invention of the method known as 'open competitive examination' as a test of fitness to enter the Service.

The germ of this idea was generated in the reform of the English Administration in India, and was carried out in the Charter Act of 1833. A special school, Haileybury, where Malthus had been a master, had been established in 1813, for training those nominated to be Indian Civil Servants, and entrants to this had to undergo a difficult examination. The training was educationally of a high grade, and the discipline strict. But patronage still played a large part in appointments and entry to the School. The Act of 1833 prescribed that, in future, four candidates were to be nominated for each vacancy and the nominees were then to compete in 'an examination in such branches of knowledge and by such examiners as the Board (of Control) of the Company shall direct' (Sct. 105).

In 1853 the Charter of the Company came before Parliament for revision, and Macaulay, brother-in-law of Trevelyan,[1] well versed in Indian affairs and English University conditions, secured the complete abolition of patronage and the acceptance of the principle of open competition of all comers. It is important to appreciate the character of Macaulay's suggestion, for it has dominated the English theory and practice of recruitment and promotion until to-day, in the Home as well as the Foreign and Colonial Services. The essence of his argu-

[1] Permanent Secretary of the Treasury.

ment is to be found in this part of his speech to the House of Commons (23 June 1853):

'It seems to me that there never was a fact proved by a larger mass of evidence, or a more unvaried experience than this: that men who distinguish themselves in their youth above their contemporaries almost always keep to the end of their lives the start which they have gained.'

In July, 1854, Macaulay was called upon by Sir Charles Wood, Chancellor of the Exchequer, to head a committee of distinguished men (including the Principal of Haileybury College; Benjamin Jowett, then tutor and later Master of Balliol, Oxford; and Sir George Shaw Lefevre, who had had long administrative experience) to report upon the recruitment of the Indian Civil Service. He read his completed draft to his brother-in-law, Trevelyan, one Sunday, and 'Trevelyan was much pleased'. His scheme of open competition and his list of subjects and marks were accepted in their integrity. In January, 1854, some months before this report, Macaulay already remarks that a plan was maturing for the appointment, on a large scale, of public servants at home, that it was to be mentioned in the Queen's Speech, and he has a long talk with Trevelyan on the subject in the same month.[1] Open Competition was thus invented and put into practice for India, and it became the pattern for reform of the Civil Service,[2] and later still a model for the U.S.A. and the envy of France.

Meanwhile an extensive and careful inquiry had been set into operation by a Treasury minute of November, 1848. It ran as follows:

'The First Lord and the Chancellor of the Exchequer state to the Board (of the Treasury), that they consider it desirable that an inquiry should be instituted into the present state of the establishment of the Treasury, and into the arrangements and regulations for the distribution and conduct of the business, in order that such changes may be made as may be required to secure the highest practicable degree of efficiency, combined with a careful attention to economy, etc., etc. . . .'

Lord John Russell was then Prime Minister, and Sir Charles Wood the Chancellor of the Exchequer. The inquiry into the various Depart-

[1] Macaulay, II, 374 et seq.

[2] Later in his speech Macaulay cleverly analysed the operation of competitive examinations: 'Under a system of competition every man struggles to do his best; and the consequence is that, without any effort on the part of the examiner, the standard keeps itself up. But the moment that you say to the examiner, not "Shall A or B go to India?" but "Here is A. Is he fit to go to India?" the question becomes altogether a different one. The examiner's compassion, his good nature, his unwillingness to blast the prospects of a young man, lead him to strain a point in order to let the candidate in if we suppose the dispensers of patronage left merely to the operation of their own minds; but you would have them subjected to solicitations of a sort it would be impossible to resist. The father comes with tears in his eyes; the mother writes the most pathetic and heart-breaking letters. Very firm minds have often been shaken by appeals of that sort. But the system of competition allows nothing of the kind. The parent cannot come to the examiner and say: "I know very well that the other boy beat my son; but please be good enough to say that my son beat the other boy"' (*Hansard*, Series 3, CXXVIII, 754; 755).

ments was directed, and in part conducted, by Sir Charles Trevelyan who was later joined by Sir Stafford Northcote. They were assisted by one or more members of each Department examined. The reports cover about 450 pages, including the General Report, by Northcote and Trevelyan on 'The Organization of the Permanent Civil Service'. It is interesting to notice that the term 'Civil Service' in reference to the Home Establishments was now used for the first time. The report was issued in November, 1853, together with an opinion upon it by Benjamin Jowett, collaborator with Macaulay in the Indian Reforms. About forty other distinguished people in public life and education were also asked for their comments, which were sent in between January and June, 1854, and the whole was placed before Parliament as the 'Report and Papers relating to the Re-organization of the Civil Service'. The plan was greeted by John Stuart Mill as 'one of the greatest improvements in public affairs ever proposed by a Government'. This improvement consisted of that which Macaulay's Committee on the Selection and Training of Candidates for the Indian Civil Service was at about the same time recommending for India. It was the abolition of patronage and the admission of people into the Service at prescribed ages and by means of competitive examination. Two other principles were laid down. The Commissioners recognized that a clear distinction could be drawn between the intellectual and routine work of the Service, and demanded an appropriate division of labour, and for each a separate type of examination. This involved classing civil servants—a problem which has never ceased to give trouble, and which has never given complete satisfaction.

A further point in these recommendations calls for remark. Thinking mainly of the higher administrative posts, the Commissioners laid down another principle, which still, but with some modifications, holds good in England, and distinguishes the British type of recruitment for that class from recruitment in other countries, notably France and Germany. The report was antagonistic to any technical preparation for the examination for such posts, for the Commissioners had their eye upon the classical and mathematical education at Oxford and Cambridge of their day. They were impressed by Macaulay's argument that

'men who have been engaged, up to one and two and twenty, in studies which have no immediate connexion with the business of any profession, and the effect of which is merely to open, to invigorate, and to enrich the mind, will generally be found, in the business of every profession, superior to men who have, at eighteen or nineteen, devoted themselves to the special studies of their calling. Indeed, early superiority in literature and science generally indicates the existence of some qualities which are securities against vice—industry, self-denial, a taste for pleasures not sensual, a laudable desire of honourable distinction, a still more laudable desire to obtain the approbation of friends and relations. We, therefore, think that the intellectual test about to be estab-

lished will be found in practice to be also the best moral test that can be devised'.

The principles here set out still stand as the foundation of the English Civil Service. There have been modifications in the course of the seventy years since that time owing to the growth of technical studies at the Universities, but to a large degree the general foundation of liberal studies remains. The 'mere smatterer' is not wanted. Even to-day the study of the Greek and Latin language, history and literature is strongly believed to produce the best type of administrative officer.[1] This belief has much to commend it, for it is not the knowledge of school subjects that is wanted in the administrator, but a way of thought, a mental and moral discipline. The aim is not to secure an expert but an administrative officer who is capable of becoming skilled by contact with his actual work and able to say at what exact point an expert shall be called in. The examinations demand an education which will produce candidates with the highest power of enlightened common-sense.

'The outlook, power and quickness in comprehension, the gift of dealing with people, the readiness to take the initiative and to assume responsibility, are all in the main highly developed when the business to be transacted is seen by the Civil Servant against a background of other knowledge of the type through which the mind has become developed.'[2]

The highest class of administrative officers thus provided has gone under different names (e.g. the Upper Grade, the First Division, the Administrative Class), but it has so far consisted of the pick of the Honours men in the classics and science (including mathematics) courses at the older Universities, with the bias on the former. From the upper and higher middle classes of the country, the only ones until quite recently who could afford such an education, came generations of young men into the Service who had precisely the liberal, literary turn of mind, without professional prejudices or bureaucratic pedantry, fitted to work hand in glove with the Parliamentarian, to act inoppressively towards the public, and smoothly direct the Departmental energies. The composition of that class is now in process of change and so are the demands upon it of a new era in national life. To this I will revert later.

[1] This statement is rather truer of the Committee on the Civil Service Class I Examination of 1917, than of the present policy of the Civil Service Commissioners, which is to draw recruits from a large variety of schools. The bias of the Committee is shown in this representative extract from its Report (Cd. 8657 ; 1917) : 'To teach the classical learning and develop classical scholarship there was at work in 1914 a great band of scholars equipped by the tradition, the organized learning, and the experience of four hundred years. . . . A large proportion of the most able students have gone in the past to classics, and we cannot alter the natural habits, the prepossessions, and the system, that have caused the most gifted among literary students to follow the ancient studies.'

[2] Lord Haldane, in *Journal of Public Administration*, I, 29.

The Commissioners laid down certain other rules for efficient and convenient recruitment of officials. First, all examinations should be conducted by a single authority standing entirely outside the separate Departments. This would secure effectiveness and consistency; and in this England, Germany and the U.S.A. have followed much the same path, while France differs, having an examining authority in each department. Second, examinations should be held at regular intervals and not for special appointments. Third, successful candidates would be allowed to enter the departments of their choice in order of their place on the pass-lists; not so in France or the U.S.A. Fourth, there should be a period of probation before candidates were finally placed on the established staff.

Only part of the recommendations were carried into execution, and this, in the teeth of strong protest from the clubs, political and society, from politicians, and from everybody who had something to lose by the reform.[1] Macaulay, wandering into Brooks' in March, 1854, found everybody astounded by Trevelyan's plans for the abolition of patronage at home. The reformer of the Indian Civil Service was never so depressed as when he had been spending part of his afternoon at the club. The storm from clubland almost swept Trevelyan, the Sir Gregory Hardlines of Trollope's *Three Clerks*, out of office. A remark made by the latter in 1875 (before the Playfair Commission on the Civil Service) is too interesting to put into a footnote.

'I wish', he said, 'briefly to explain the circumstances which led up to the Report of Sir Stafford Northcote and myself on the organization of the Civil Service. *The revolutionary period of* 1848 *gave us a shake* [my italics], and one of the consequences was a remarkable series of investigations into public offices, which lasted for five years, culminating in the Organization Report.'[2]

By an Order in Council of 21st May 1855, the Civil Service Commission—the central board of examiners—was established, with three

[1] It is interesting to remember that Gladstone, who urged on this reform, did so on the ground that the higher classes would get administrative power. He believed, in 1854, that the aristocracy of this country were superior in natural gifts, on the average, to the mass, and with their acquired advantages, their 'insensible education', irrespective of book-learning, were immensely superior. See the letter to Lord John Russell, 20 Jan. 1854, in app. to Morley's *Life*. Queen Victoria was much perturbed by the suggested reforms and consented to them most grudgingly. *Letters*, 7 and 17 February 1854.

[2] *Parliamentary Papers*, 1875, XXIII, 100. It is remarkable that Trevelyan's services to the English Government, at home and in India, have not yet received a mark of gratitude in the shape of a full memoir. The *D.N.B.* gives scant information about him. Born in 1807, at Taunton, he was educated at the Grammar School, and at Charterhouse, and thence proceeded to Haileybury. He entered the East India Company's Bengal Civil Service as a writer in 1826 and rapidly rose to high administrative office, his interest and endeavours being directed especially to public education and finance. In 1838 he returned to England, and from 1840 until 1859 he was assistant, and later permanent, Secretary to the Treasury. It was in this period that he helped so materially to bring about the re-organization of the Home Civil Service. In 1859 he returned to India as Governor of Madras.

members, with tenure during the pleasure of the Crown, 'to conduct the examinations of young men proposed to be appointed to any of the junior situations in the Civil Establishments'. The Commission would decide upon the age, health, character, and requisite knowledge and ability for the discharge of their official duties, and would give a certificate to this effect precedent to the appointment. The extent of the actual reform was this: competition, not compulsory but permissive, was made the basis of appointments, but only throughout the ranks of the junior offices; the power of appointment, following the issue of the Commissioners' certificate, was still in the hands of the political heads of Departments, and a six-monthly probation period was established. Abuses were thus limited, not entirely swept away. People of mature age who had special qualifications for a particular post were not required to have the Commission's certificate.

It was twenty years before party attacks upon the work of the Commission ceased and it was left to work in peace.[1] The Superannuation Act of 1859 supplied a sanction to the rules of the Order in Council by providing that with certain special exceptions (professional officers of mature age being the most important) no person should thenceforward be deemed to have served in the Civil Service and entitled to a pension unless he should have been admitted with a certificate from the Civil Service Commissioners. In 1870 the Order in Council of 4th June completed the edifice thus created—its essentials were these: First, the test of open competition was made obligatory practically throughout the Service; second, in the case of professional officers, the Civil Service Commissioners might dispense with the examination test if they thought fit; thirdly, certain officers appointed directly by the Crown (in 1914 these still numbered about 300, since considerably reduced) needed no certification whatever by the Commissioners; fourth, for certain situations, where the Head of the Department wished to dispense with an examination, the Civil Service Commissioners could consent at the request of the Head of the Department and the Treasury. Lastly, but very importantly, the Treasury, which necessarily had powers of co-ordination and control permeating all Departments because of its financial responsibilities and powers, was given special authority in the field of Departmental organization. It was to approve the rules for testing candidates made by the Civil Service Commission and the Departments, and the periods at which examinations should be held, the number of vacancies, and the grouping of situations to be competed for.

[1] Cf. Anthony Trollope in an article in the *Fortnightly Review*, 15 October 1865: 'We, Your Majesty's Civil Service Commissioners, humbly offer your Majesty this our Tenth Annual Report.' Thus the dread document now under notice is commenced, reminding us with terrible earnestness of the quiet progress of the years. Here is their tenth report, and it was but the other day that we were discussing whether these Commissioners would ever have real existence!

Since 1870 the development of the Civil Service has been marked by a series of thorough inquiries always searching for improved efficiency. There were the Playfair Commission of 1875, the Ridley Commission of 1884–90, the Macdonnell Commission of 1910–14, and the Gladstone Committee of 1918, and all of these had before them the questions of classification, recruitment, and promotion, all interdependent parts of a single problem. The last and most fertile of the great Commissions was the Macdonnell Commission of 1910–14 whose reports constitute the most detailed analysis and the best picture of the Civil Service as it was at that time, and a most fruitful source of post-war re-organization. It should be noted that there is no one general statute for officials as there is in the States and the Federal Authority in Germany, and as it is demanded in France. The foundations of the Civil Service are established, for the most part, by Orders in Council and not by Acts of Parliament. They were drawn up by successive Cabinets in accordance with the recommendations of Royal Commissions; Parliament was not asked in any effective sense to ratify them, although it occasionally discussed their general character, and the Treasury and the Civil Service Commission were made the custodians of their execution.[1]

HOW THE SERVICE IS CONSTITUTED

The Civil Service now comprises approximately 434,000 persons.[2] This number falls broadly into four great groups:

Industrial Workers	122,000 [3]
Manipulative Staffs	178,500 [4]
Messengers, Porters, Charwomen, etc.	16,500
All other grades	117,000 [5]

The Servants in these groups are employed in different proportion in each Department, some among the group 'all other grades' being employed only in several, not in all of the Departments. It depends upon the nature of the work of the Department. The classes employed in each Department were created at different times, as a result of the development of new tasks; hence at every examination of the Civil Service by a Royal Commission it has been found that the classes in each Department have outgrown and overgrown the main principles of classification laid down by the previous Commission. The present grouping, then, of the 'all other grades' with which we are principally

[1] They are now brought together—at least the gist and references thereto—in Royal Commission on the Civil Service (1929), Appendix to Part I of Minutes of Evidence. *Introductory Memoranda relating to Civil Service* (63–49), 1930.

[2] *Introductory Memoranda*, p. 3.

[3] Employed in Dockyards, Woolwich Arsenal, P.O. Engineering Dept., Office of Works, Stationery Office, etc.

[4] Employed mainly in Post Office.

[5] As shown in analysis which follows in a few lines down.

concerned is the result (*a*) of casual events up till 1920 and then (*b*), in 1920, of a partially successful attempt to assimilate these grades into the scheme of general Civil Service classes established upon the Report of the National Whitley Council on the Organization of the Civil Service.[1] Thus there are certain 'general' classes, and certain 'departmental' classes. The Service other than Industrial Workers, Manipulative Staffs and Messengers, etc., consists of:

A. *General Classes.*		B. *Departmental Classes.*	
Administrative	1,140	Executive	11,050
Executive	4,357	Clerical	16,577
Clerical	23,265	Unestablished Clerical	17,325
Writing Assistant	5,241	Unestablished Typing	3,232
Shorthand Typists	4,279		

	Assessors, Collectors, Distributors and Clerks to Commissioners of Taxes	3,811
	These together make about	98,300
Then there are:		
17,380	Inspectorates	2,154
	Professional, Scientific and Technical Staffs	6,504
	Subordinate Supervisory and Technical	8,722

For all these classes save one, the principles of recruitment need little discussion here, because their work is rather specific and this carries with it a concrete definition of the qualities required. So with executive work, though this is a little more difficult of definition than the other classes (and difficulties also are naturally experienced with some of the units in the Inspectorate), so with the Clerical, the Typists and the Professional Scientific and Technical Staffs where a well-known course of training is provided by certain responsible bodies. Little attention will be paid to these or the Industrial and Manipulative Staffs in the following discussion of recruitment; some attention is given to them in the sections on promotion and political and civic rights.

The class with which we wish mainly to concern ourselves here is the Administrative class, which numbers a little less than 1,200. This is the pivotal and directing class of the whole Civil Service. From the Permanent Secretaries down to the Assistant Principals they are responsible for transmitting the impulse from their political chief, from the statutes and declarations of policy, through the rest of the Service and out to the public. They translate the wishes of the political side of government into workable and legally valid rules; and to that end use scientists and lawyers as they are required. It is their business to gather together and weave the strands of science and law necessary to the determination of policy by the Minister, and this may issue in the drafting of projects of law, amendments thereto,

[1] 7 February 1920.

answers to parliamentary amendments and various kinds of public explanations. They are responsible for the control of Staff, for the execution of the work of the Department in this country, in the Colonies and Dominions, among the local authorities, for answers to the public. And more—for anticipation of the future in the discovery and mastery of the latest thought about the subject matter of their Department. Let us give the Administrative Grade's own formulation of their duties [1]:

'The volume of official work which calls for decisions affecting the public is nowadays such that it is physically impossible for the Minister himself to give the decision except in the most important cases. And further, even when the issue is one which can and must be submitted for the Minister's personal decision, it has to be fairly and fully presented to him so that the material facts and considerations are before him. The need for services of this kind is present in every department which has a political head.

'There is another common feature of all work which is strictly administrative in character. It is usually described—for instance, by the Reorganization Committee of 1920—by the somewhat general expression "the formation of policy". What is meant is, we think, this. The business of government, if it is to be well done, calls for the steady application of long and wide views to complex problems: for the pursuit, as regards each and every subject-matter, of definite lines of action, mutually consistent, conformed to public opinion and capable of being followed continuously while conditions so permit, and of being readily adjusted when they do not. Almost any administrative decision may be expected to have consequences which will endure or emerge long after the period of office of the Government by which or under whose authority it is taken. It is the peculiar function of the Civil Service, and the special duty of the Administrative Class of that Service, in their day-to-day work to set these wider and more enduring considerations against the exigencies of the moment, in order that the Parliamentary convenience of to-day may not become the Parliamentary embarrassment of to-morrow. This is the primary justification of a permanent administrative service. Vacillation, uncertainty and inconsistency are conspicuous symptoms of bad administration. The formation of policy in this limited sense—subject always to the control of the Minister and to the supreme authority of Parliament—is typical of administrative work in all departments and in relation to all subject-matters whether of greater or of lesser importance.

'All administrative work is carried out under statutory authority or, in certain fields, under the prerogative powers of the Crown. To

[1] *Statement submitted by Association of First Division Civil Servants*, pp. 5 and 6 (App. VIII), Evidence, Royal Commission in Civil Service (1930).

a large extent it consists in the application to particular circumstances of general principles laid down in the statutes, or the administration of financial provision made by Parliament, in pursuance of the powers vested in the Department in that behalf. It involves necessarily the preparation or study of proposals for the alteration of the existing law in the light of changed circumstances, new policies or experience. It is indeed true that proposals for amending legislation within the administrative sphere do, to a large extent, and perhaps mainly, emanate from Departments. The statement that these processes form an important part of the work of administration affords however no ground for any suggestion that the Civil Service seeks to usurp the functions of Parliament itself. The functions are essentially different.

'These, we conceive, are the common characteristics of all administrative work, whatever the subject-matter. In each particular branch of that work other characteristics will also be found, but they are special to those branches. For example, in the Board of Education and Ministry of Health, the important function of maintaining good relations with the autonomous Local Authorities, while securing in general the application of those standards of local administration which Parliament desires, is a type of work which is not found in a Department like the Customs and Excise or the Admiralty. Similarly, in some branches but not in others one of the functions of administration is the determination of policy in the light of technical advice, which has to be weighed and balanced against other non-technical considerations, such as financial conditions or the state of public opinion.

'Thus the efficient performance of the administrative work of the various Departments calls in all cases for a trained mental equipment of a high order, while in the particular case powers developed in some particular direction are needed. In some spheres, what is most wanted is judgement, *savoir-faire*, insight and fair-mindedness; in others, an intellectual equipment capable of the ready mastery of complex and abstruse problems in, for instance, taxation or other economic subjects, imagination and constructive ability.

'It is important to distinguish between the substance of administrative work and its form. The latter may be a memorandum, a draft regulation, an inquiry, a conference or interview, a verbal decision or instruction to a subordinate, or a minute on official papers or an official letter. The substance of it is the exercise of a sound and informed judgement upon the subject-matter in hand; and this is equally true whether that judgement be final or to be submitted to higher authority.'

Then how should these officials be recruited? This depends upon the definition of the type of mind required. Since, however, the

work is so general, so incapable of specific, measurable definition, both the type of mind required for it and the type of training required are exceedingly difficult of definition, and it is hard to resist the conclusion that the present arrangement has been drifted into rather than created after careful rational analysis of the problem presented.

This division is recruited together with the Indian Civil Service and the Eastern Cadetships and the Diplomatic and Consular Service at the age of twenty-two–twenty-four in the August of each year.[1] The age of recruitment corresponds with a completed university education, that is, at least three years' full-time work. Only those who take high Honours at a written or oral examination of a very severe type can expect to pass the Civil Service examination for this particular grade. Some years of professional acquaintance with many students who have been candidates convinces me that in the majority of cases only those of the highest intelligence, intellectual capacity and character stand a chance of success.

Now this class started as the preserve of the Upper and Middle classes, since only they were able to afford an Oxford or Cambridge education. The provision of scholarships for poor students has of late years resulted in an increasing number of successes among those who have worked their way up from the public elementary schools, and the newer Universities of London and the Provinces are annually competing with greater force than before for the number of places open to competition. Unfortunately it is impossible to get adequate figures of the percentage of elementary school boys who have been able to climb the educational ladder and compete successfully for entry into the Administrative class. But the Civil Service in this branch is still dominated by the greater and lesser public schools and the older Universities. Out of eighty-seven appointed between 1925 and 1929 (inclusive), seventy-two were Oxford and Cambridge men and women, five from London University, and the other ten from provincial universities. Of course the greater number of candidates were from Oxford and Cambridge.[2]

The virtues of their social class and educational antecedents are manifest. To the Service they bring loyalty, ability and fresh-minded-

[1] Up to 1919 admission to the Diplomatic Service and the Foreign Office was limited to those who had a private income or allowance of £400 a year, and could (as in the case of Diplomatic Attachés) afford to work abroad without pay for the first two years. This qualification was abolished in 1919. Now, to quote the Foreign Office List, 'candidates desiring to be appointed to the combined services will first be required to appear before a Board of Selection, which will decide whether they possess suitable qualifications for entry into the Foreign Office and the Diplomatic Service'. For those candidates special arrangements are made in the Class I Examination to ensure a thorough knowledge of French and German and some other modern language.

[2] Cf. Royal Commission C. S. (1929), Minutes of Evidence, Vol. I, Table I, p. 115.

ness. But two things are open to criticism. Their course of education, besides being admirably fitted to make good public servants, is also, as things now are, a process of initiation into a social caste. This brings with it a certain amount of nice-mannered arrogance and exclusiveness not altogether congenial to grades outside this class, whose group loyalty, while it is a spur to co-operation within, is an obstacle to the ready acceptance of talent and truth from without, and to the necessary exposure of inefficiency. Its knowledge is not fully representative of the nation, but only of a part. It contains prejudices which need correction. The educational system should be further made to provide such opportunities that the Service can be recruited regardless of class and locality. The criticism passed above would, of course, lose its basis in a generation if the rate of recruitment from the public elementary and secondary schools were properly increased. The Foreign Office and Diplomatic Service are still the preserve of those who fill up Eton, Harrow and other great public schools, as can be seen from any annual report of the Civil Service Commission.

The second criticism is that these officials have obtained their conception of society and social processes through books and lectures and home life to the time of their examination; and from entry into the Service they watch but a minute part of the universe at work through the window of their own Department.[1] They pass from the study into the office, and not a chink of the open sky or a breath of the fresh breezes of real life invigorates their mentality. Their knowledge is consequently unconscious of many realities and second-hand. They can deal admirably with paper, but not so well with men and events.[2] The Macaulay Report said nothing about training other than a University course. The Macdonnell Commission was satisfied in the belief that a University education with its incidental training and formative influences produces the proper type of public servant. The Reorganization Committee of 1920 made no advance on this. All of them held that almost any studies would do, and that the force of competition would produce men of zeal and ability—even more, that an indication would be provided of future development of character

[1] Cf. Wilson (Permanent Under-Secretary of State for the Colonies), ibid., 2, 20981. 'I picture to myself a man going into the Civil Service at the age of 22 or 23, or whatever the age is, coming from the University, passing the examination, and sentenced for the rest of his life to live in Whitehall, and to come up by train every morning from Woking and go home at the same time every evening, always seeing the same people, always dealing with the same work. I think it requires very little imagination to realize what that man must become after about twenty or twenty-five years, if he does not see more of the world. I think it is wonderful that they are as good as they are.'

[2] It should be said that the official is now rather more in touch with the public than he was before the War. The public has, as it were, broken into the Service, and it was the War which speeded up the possibility of its doing so. The cleverer men get ample chances to cope with M.P.'s, to conduct inquiries in or outside London, to be secretaries to committees and commissions, etc.

and talent. Indeed, the members of the Committee on the Class I Examination appear to have been too much impressed by the work of Class I, as dictated by the days when they were young. They prescribed not for the Civil Service of to-day, still less of to-morrow, but of that of, say, 1890, or 1900.[1] But the State has applied its formidable power to almost every aspect of life. The ability to find and understand apt words is the smallest part of what a modern State administrator needs. We need wise and forceful men in tune with the vast activities and machinery of modern civilization. More and more will they govern though Parliament continues to reign. This, I believe, is what Sir George Murray was trying to make plain to the Commission of 1914 and it is exactly what the Committee on the Class I Examination did not see.[2]

Two grave questions arise, (*a*) whether the subject of training and recruitment are the proper subjects, and (*b*) whether a period of practical training before ultimate appointment is not desirable. The first question is only answerable upon more careful analysis of the work of the administrative class than has been given to it. Not a single report hitherto issued, nor the evidence given under cross-examination at the Royal Commission of 1929, nor, unfortunately, the Report of that Commission,[3] treats the Administrative Grade other than a grade common to all Departments and therefore without the need of special training for each. There is simply a

[1] Cf. Report, para. 23. 'We consider that all well educated young men should be able to use the English language skilfully and accurately and to grasp its meaning readily and correctly.' Of course! And what else?

[2] (App. to First Report, Royal Commission on Civil Service, Cd. 6210, 1913. Questions 1955 and 1958.)

Sir George Murray (1955). 'What I was thinking of was this: That while the men who are drawn from the Class I Examination are, I think, very good for the purposes for which they are required for the first ten, or twelve, or fifteen years of their official life, I have at times been rather disappointed at finding how few of them emerge satisfactorily from the ruck and come out as really capable heads of *departments*.'

1958 (Chairman): 'Will you just explain a little further. Is there, do you think, anything defective in the original way of selecting the first-division men, which explains the fact you mentioned of their turning out badly when they get to fifteen or twenty years' service?' Sir George Murray: 'I did not wish to say that I thought they turned out badly as a body, but merely that I should have expected that more of them would have been better qualified for the best places that were open to them. But I do not think that anything you could do in prescribing the subjects for examination or in making any change in the methods of appointment, could possibly affect that.'

The comment made upon this by the Committee on the Class I Examination was (para. 13, pp. 10 and 11): 'If among those selected by open competition there are not always to be found a sufficient number who, after many years of service, are, by virtue of their initiative, force of character, freshness of mind, and constructive ability, fit for the highest posts, the fault may lie in the system of training after entry, and in the conditions of subordinate service; it need not lie with the competitive system.'

[3] *1931*; Cmd. *3909*; for an example of perfect abdication of judgement, see its paragraphs 239–43.

vague description of the work of *all* the members of the grade. Hence two things result: a vague description carries with it only vague recipes for training, and there is excluded without discussion the possibility of a combination of a general test with certain special studies according to the first department to be entered. The vague description has resulted in a syllabus of examination subjects, and therefore of training, out of touch with modern civilization and its tasks; and the exclusion from discussion of special preparation for the test partly accounts for the dissatisfaction felt in some departments with the product of the present arrangements. I see no reason, for example, why the same reasoning which Sir Warren Fisher applies to the entrants into the Treasury and Sir S. H. Wilson to the Colonial Office does not hold good of entrants into any other Department—namely that the tasks are rather special and difficult: [1] what of the work of the Ministry of Health, the Ministry of Agriculture and all the rest?

The true fact is that as so often happens in public administration, the institution which exists is converted to a new purpose, it is then bedecked with a *post-facto* justification, and developing needs, instead of being given their own appropriate form of expression, are cramped into the old mould because the justification has come to be held without criticism. So with the Universities and preparation for the Civil Service in England, so with the faculties of law and preparation for the Civil Service in Germany, so with hundreds of other phenomena in the State. But this is insufficient. It is not enough to draw Servants from a given source and then 'find that some do not suffice'; it is insufficient for the Permanent Heads of the Departments to go to the Head of the Civil Service 'some censorious and some purring like cats'.[2]

In fact the scheme of examination has not failed to be affected by the demand that the political and social sciences should figure more prominently. But the subjects were not given, in the reform of the syllabus in 1917, the entire dignity and weight in marks conferred on the Classical Languages, History and Literature; the Modern Languages, History and Literature; History; Mathematics and the Natural Sciences.[3] The cool, calm tone in which the Revising Committee speak on this subject is the tone of those blessed by blindness of it:

'There is also a great range of university studies, political, legal, economic and philosophical—which have not been as yet, as far as we know, consolidated into one Honours School, though the courses offered by the London School of Economics may cover the most part of them. We have greatly increased

[1] *Evidence, R. C. C. S.*, Question 18,787. [2] Ibid., Question 18,720.
[3] Compare *Civil Service Examinations* (1927) for subjects and marks.

the collective weight of these studies, but we do not consider it desirable that candidates for the Civil Service should study exclusively either politics, law, economics, or philosophy.' [1]

There is no Honours School! The proper reasoning would seem to be: for the highest grade of the service the appropriate training is in (*a*) subjects of general culture, (*b*) the nature of society and law, (*c*) those special studies which are a background to the work of certain departments of State—like economics, local government, public finance, administrative law, the economic and technical development of agriculture. Where there are no Honours Schools the State should create them. It could then proceed the more certainly by the joint method of examination and recommendation from the colleges where the men were taught: for a process of selection is there always going on.

Even at present the only common meeting-ground for all candidates is the compulsory part comprising (1) Essay; (2) English; (3) Present Day Knowledge; (4) Everyday Science; (5) Auxiliary Language; (6) *Viva Voce*, each carrying 100 marks, except the *Viva* which carries 300. Specialization has already thrown up the difficulty of judging between the merits of students generally taking Ethnology, Physiology, Chemistry, Botany. Increased specialization with a view to entry into a particular department would not increase this difficulty —though it would need other arrangements. Moreover, the social sciences are to-day capable of being taught to give the mind a general liberal culture as well as to give it a special cast and interest. Let it be admitted that the primary object is not to produce an expert, but a man of general intelligence who may learn whatever *expertise* is ultimately necessary; yet there is all the advantage in attaining to general intelligence through the branches of the social sciences.

The next question is the interview. It was established in 1917 upon recommendation of the Committee on the Class I Examination. It said:

'The Royal Commission expressed a cautious inclination towards a *viva voce* examination, but made no definite recommendation. The Consultative Committee appointed by the Board of Education on Scholarships for Higher Education in their report, 1917 (Cf. 8291), say that there should be a *viva voce* examination.[2] On this point, as on almost every point of our report, we are unanimous. We believe that qualities may be shown in a *viva voce* examination which cannot be tested by a written examination, and that those qualities should be useful to public servants. It is sometimes urged that a candidate, otherwise well qualified, may be prevented by nervousness from doing himself justice *viva voce*. We are not sure that such lack of nervous control is not in itself a serious defect, nor that the presence of mind and nervous equipoise

[1] Report Cd. 8657; Committee to consider Scheme of Examination for Class I of Civil Service.

[2] Actually they were concerned with the selection of candidates for scholarships, and not with the choice of administrators.

which enables a candidate to marshal all his resources in such conditions is not a valuable quality. Further, there are undoubtedly some candidates who can never do themselves justice in written examinations, just as there are others who under the excitement of written competition do better than on ordinary occasions. . . . We consider that the *viva voce* can be made a test of the candidate's alertness, intelligence and intellectual outlook, and as such is better than any other. . . . We consider that the *viva voce* examination should not be in matters of academic study, but in matters of general interest, in which every young man should have something to say.'

The Civil Service Commission endorse this statement and

'consider that for these two competitions (Administrative Grade and Assistant Inspector of Taxes) they would not be adopting the best method of securing the most suitable persons, unless at least as much weight as at present be accorded in the allotment of marks to a candidate's personality and suitability for the performance of his future duties'.[1]

As subjects to the value of 1,000 marks must be offered from the various thirty-eight options, the *viva* mark is equal to one-sixth of the total marks, i.e. 300 out of 1,800. It is an important proportion and it has the effect of greatly altering the position of many candidates on the list of the written examination. 'For the candidates for the Home Civil Service in the Administrative group competition of 1928, seven owed their place in the first thirty to their *viva voce* marks; in the 1929 competition the corresponding number was four.'[2]

What is the character of this interview which can make so much difference? The evidence given before the Royal Commission up to January, 1931, would point to these conclusions:

(1) All witnesses desire an interview as a necessary adjunct to written examination on the grounds that there are qualities of character and behaviour which are essential in personal intercourse, in the giving and receipt of commands and advice, which may not be tested by written examinations, which can only be revealed by personal interview.

(2) All desire that the *viva* shall be a really probing test of *service* and not *personal* or *class* qualities.

(3) Many are afraid of the possibility of a charge of political unfairness if the test should be made a previous eliminating test, designed to admit and exclude altogether from the examination.

(4) All recognize the possibility of real error in the results of the interview; some admit that mistakes have been made.

(5) It is revealed that the present interview lasts about one-quarter of an hour; occurs most usually *before* the examination; is therefore not based upon the subject-matter of the examination; that the interview is a desultory conversation, formless and almost

[1] Royal Commission C. S., 1929, Min. Ed., p. 60, para. 18.
[2] Ibid., para. 19.

void[1] regarding the scholastic career and the social interests and activities of the candidate; that nothing much is tested by it, and that, in fact, the college tutors' reports play a considerable part in the result.[2] Further, the method does not make *sure* of retaining the good ones, or of getting rid of the bad ones.

Now a test of this kind does lend itself to suspicions that qualities other than those important for the *service* have undue weight, and at any rate private statistical analysis of the result of the examinations from 1924 to 1929 shows that 'on the average when a candidate submits himself for the *viva voce* test, there are forty marks which may be added to or subtracted from the true measure of his personal equation, and these forty marks will be added or subtracted in a haphazard manner. . . . But the *viva voce* test on which is awarded 300 marks maximum, lasting perhaps fifteen minutes, and carrying with it a random plus or minus forty marks may be altogether decisive. That this is the case may be seen from a consideration of results in recent years. . . . This element of chance may actually operate in the same way as if a candidate's fate were being decided by the tossing of a coin or the throw of a dice.'[3]

This is not difficult to explain. There is a great difference between the private-business interview and the Civil Service *viva*. In the former the employer knows in great detail the nature of the specific job to be filled; and capacity to fulfil its duties is preferred to adventitious qualities. The Civil Service Board of Interview do not know the exact character of the situation, and since they will never see, and certainly will not lose money as the result of a mistake, they are more likely to be influenced by whether the applicant is generally 'nice' or not. They are in a psychological atmosphere where everything prompts them to award a prize to those who find favour in their sight; they are not sufficiently mercenary to avoid assessing incidental attributes at exaggerated values. Certainly the evidence before the Royal Commission has destroyed any possible belief in the accuracy of the present interview.[4]

What are the proper principles of procedure for the future? The system should be built upon these bases: (1) the interview should last at least half an hour on each of two separate occasions; (2) it should be almost entirely devoted to a discussion ranging over the academic interests of the candidate as shown in his examination syllabus, and a verbal report could be required on such a subject the scope of which

[1] Cf. Royal Commission C. S., Question 1419.

[2] Royal Commission C. S., Question 1375.

[3] Rhodes, *Public Administration*, April, 1930, 231–6.

[4] Yet, in the Report, pp. 69–71, they say no more than this: We are satisfied with it. Perhaps it may correct the qualities tested in a written paper. The choice of the personnel of interview boards needs great care. No class prejudice exists in the interview. What an abdication!

would be announced at the interview; (3) as now it should be an additional test, not an absolutely decisive selective test; (4) the marks should be reduced from 300 to 150 maximum; (5) the interviewing board should include a business administrator and a university administrator; (6) the interview should come *after* the written examinations; (7) tutors' reports should not be consulted until the interview stage has been concluded and marked.

Suppose that by the proper written examination and an interview the standard of selection, which is already good, is improved, is that enough? There is still one difficulty which must be surmounted: and that is the mere book-learning and lack of experience of the administrative entrant. What can a boy of twenty-two–twenty-four know? My own teaching experience suggests to me that the Service would be better manned if some specific form of practical training were to follow the acceptance into the Service. Now the administrative entrant is subject to two years of probation. If this time were deliberately used for training there would be only the question of what kind of training to consider. In fact the probation period is not really *effective*; that is, the entrant is assimilated in the department, does responsible work, and in fact, is rarely excluded from the Service as a result of the probation.[1] Now it is good that responsibility should come early: but it is as important that probation should be a reality and that it should be allied with training. In the first place a different attitude of mind is required than that which now prevails.[2] Secondly, I suggest a different kind of treatment altogether is required. It should be an amalgam of work with local government authorities and foreign travel, lasting for about two years. Some method must be found of giving the Civil Servant in the top grade what William James called the 'pungent sense of effective reality'. I believe it would repay the country again and again if it gave its successful candidates, even before they had chosen their Departments, the Grand Tour abroad for two years. That would shake complacency, institute comparison, compel reflection, and broaden the mind, as nothing else can. The entrants into the administrative grade have nothing like the experience common among young business men. But a business man is merely an administrator free of hierarchical direction, just as the capitalist system, from the standpoint of organization, is nothing but extreme economic decentralization. Consider the multitude of physical and spiritual difficulties a business man has to learn to conquer before he can acquire the art of management, the constant occupation with first-hand realities which he must master to be successful in the offer of his services and the sale

[1] Sir John Anderson, R. C. C. S., *Evidence*, Questions 2147, 2193.

[2] Cf. recommendation of the association of First Division Civil Servants, Royal Commission C. S., App. VIII, No. 7.

of his talents, the adjustment and reconciliation of means and ends so variable because they are human, and the training in the anxieties and calculation of a future which is never the same as the present! This is the stuff of real life and no mere book-learning or wise teachers can give it, for the only useful lessons are those which you teach yourself, and precepts are bad substitutes. Each candidate could be asked to bring back a report upon the foreign handling of a subject falling in the Department of his choice. But not more than three University terms should be spent in this way, the rest should be given to mere observation of the country. (The Colonial Office already sends its officers on a colonial tour—compulsorily.)

Then we might expect to obtain administrators with a creative understanding of the modern civilization they have elected to serve. Moreover, the sabbatical year which is gradually being introduced into the Universities, mainly due to the enlightened benevolence of American foundations, ought to be introduced into the Civil Services. Only those who have experienced the relief and refreshment of a year away from the routine of behaviour and mind can know what an inestimable benefit this is to the work and the colleagues of the sabbatarian.

Let me add to this account that the British Administrative Grade includes a number of men (two in the positions of Permanent Secretary) who have been promoted from the grades below,[1] and it is the policy of the Heads of Departments to search carefully in the lower ranks for candidates when vacancies occur before they ask the Civil Service Commission to submit the place to open competition. This is at once beneficial to the Service and encouraging to the lower ranks.

[1] From 1921 to 1928 inclusive, the appointments to the Administrative Class were 47 from promotions and 84 by competition, and some of the 84 were cases of competition limited to people already in the service. Scott, R. C. C. S., *Evidence*, Question 80.

CHAPTER XXXII

FRANCE AND THE U.S.A.

IT was not until late in the nineteenth century that France was able to overcome the twofold inheritance of the *ancien régime* and the Revolution, Favouritism and Centralization. The latter is to be discussed in a future work on the development of local government. Favouritism, though not necessarily incompetence, was stamped on the French administrative system by the Revolution and Napoleon. The first had swept away Venality, but in its place no public standards of competence had been created.[1]

The factions had their own special tests of efficiency, the first of which was—in the centre—loyalty to their principles, and, in the localities, elections carried on under conditions in which the elected officers could not act for fear of the displeasure of the local cliques and for lack of a properly ordered system and public force to support them.

Under Napoleon, a more settled and rational scheme of appointment was applied, because his rule was longer than that of the different revolutionary sects and his social schemes were more fully elaborated and applied. Nor, except as a joke, and a means to personal power, would he accept the ingenious paper-schemes of the quaint Sieyès in which one of the Consuls, the Consul de la Paix, would nominate to all the offices in the Ministries of Justice, Interior, Police, Finances and the Treasury, while the other nominated all those in the Ministries of Marine, War and Foreign Affairs. Sieyès, said Napoleon, had put only shadows everywhere, the shadow of judicial power, the shadow

[1] Taine says of the Revolution till the advent of Napoleon: 'The legislators had for ten years not considered this—("In every human society a government is necessary, that is a public authority: no machine is so useful")—they had established things as theorists, and even as optimists, without taking things into consideration or by imagining things according to their desires. In the Assemblies and among the people the task was considered easy, ordinary, and it was, in fact, extraordinarily difficult: because the problem was to produce a social revolution and to sustain a European War. Excellent instruments had been taken for granted, as supple as they were strong, but they were bad, at once refractory and fragile: because these human tools were the French of 1789 and the subsequent years, that is, very sensitive men and painfully wounded the one by the other, without political experience or preparation, utopians, impatient, indocile and over-excited' (*Les Origines de la France Contemporaine, Régime Moderne*, II, 146); and cf. sections on *L'Anarchie, La Conquête Jacobine*; and *Le Gouvernement revolutionnaire* for details.

of government. Substance was somewhere necessary, and he put it in the executive power.[1] But since the whole social scheme was politically dependent upon his personality he could not abdicate the choice of the principal officials, nor since his nature obliged him to make of France a vast barracks could he avoid naming the civil generals of his host. And the hierarchical quality of his system must be more extreme than the extreme anarchy of the preceding decade. His very genius put off the time when a system of impartial choice could be established to operate continuously and automatically according to the principles of its foundation. All revolved around the genius and personal destiny of this man. The spirit which moved him to conquer in battle, and to undertake battles at all, moved him to be grimly exigent of success in the civil field. What did it profit to win a campaign and lose the rulership of his adopted country? He could not boast legitimacy as a title, but only performance. Therefore he recognized no airs and graces, no artificial distinctions or honorific titles as a claim to office, he did not even exclude the capable *emigrés* who had returned, many at his bidding; but, side by side, he employed indiscriminately the able whether they had formerly lived by royalty or risen by killing it. The talents were required. The success of his State depended upon a variety of factors which were all present. He knew exactly what end he wished to achieve—perhaps not in the very large, but at each successive stage of his evolution. This knowledge automatically prescribed the type of men he required; for his comprehension of the science and technique of civilization was encyclopædic, and his administrative talents so unprecedentedly marvellous, that to conceive the end was at the same time accurately to conceive the means. But to have stopped at the recognition of what type of man was needed would have been insufficient. Napoleon required and possessed the faculty of judging men, of knowing with little effort how much was actually promised by external indications, and then he was ruthless in stripping the establishment of incompetents. He, therefore, with few exceptions, personally appointed, promoted, relegated or dismissed:

'A Minister would not have dismissed a single official without the counsel of the Emperor, and all the Ministers could change without two secondary changes in the whole Empire resulting. A Minister did not appoint even a clerk of the second order, without presenting to the Emperor a number of candidates and with them the names of the people who had recommended them.'[2]

We must not, of course, drive the notion too far which supposes that the Emperor had the time or knowledge for effective selection of all the thousands of officials who now spread not over France only, but far beyond its borders. But we may take it that all the officials from

[1] Taine, op. cit., p. 170. [2] Cited Taine, *Régime Moderne*, II, 168.

the highest down to what we should call nowadays in England, the Executive Class, were directly selected by Napoleon. It is said that he formed a group of some five or six hundred young men, whom he successively called to the highest functions, in order to keep out those old enough to have been influenced by the old régime. Chaptal says :

'He needed valets, and not councillors, so that he arrived at completely isolating himself. The Ministers were nought but chiefs of the bureaux . . . He administered down to the smallest details. All who surrounded him were timid and passive. One studied the will of the oracle and executed it without reflection.' [1]

There were not lacking the incentives to good work. There was ever the knowledge that the Marshal's baton lay in the drummer-boy's knapsack. And all knew the violence of the Emperor's anger with incompetents, which extended to contemptuous dismissal accompanied literally by a kick! As in the Army, the worship of talent was conducted of set purpose, loudly, publicly, ceremonially and, to pay and power, was added social distinction. The Legion of Honour was now established—'The French', said Napoleon, 'have only one sentiment, *honour*; we must nourish that sentiment, they need distinctions.' Titles of nobility were restored. Political privileges were established, like the right to be elected in the *département* and the *arrondissement*. The children of those thus distinguished received scholarships to enter *lycées* and the great military schools.

Then there was the fury of his own fierce energy. He watched by day and night, and in his prime he worked at an electric pitch of intensity, for eighteen hours a day. In six hours the year's records of a Prefect were examined, analysed, the balance of efficiency struck, and a scolding or reward administered, and reforms elaborated.

'I worked', said one official, 'from morning until night with a singular ardour; I astonished the natives thereby, who did not know that the Emperor exercised upon his servants, however far away they were from him, *the miracle of the real presence*; I believed I saw him in front of me, when I was at work shut in my study.' [2]

That, indeed, was the culmination of the Napoleonic system, and the sole condition of success of this mode of appointment and promotion—*the miracle of the real presence*.

In a previous chapter we referred to a treatise upon Public Administration dating from this time. Bonnis's analysis of the qualities of

[1] Cf. Chaptal, *Mes Souvenirs sur Napoléon* (published 1893). Chaptal was Minister of the Interior under Napoleon, p. 228.

[2] Cf. Beugnot, *Mémoires*, II, 372; cf. also for many interesting passages on Napoleon's qualities as administrator, *The Memoirs of Bourrienne*. Bourrienne was Napoleon's private secretary for some years.

an administrator are the qualities sought by the Emperor, and essential to the Emperor's system.[1]

Until the Third Republic. The fall of Napoleon took the pith out of his system, and his definitely conscious and energizing will gave way to a tawdry mock constitutionalism in which a King, Church and the Chambers strove for mastery, and within these bodies there were violent intestine quarrels. Recruitment, let us say, in 1812, had been based upon a principle of Napoleonic efficiency, and this principle had been far in advance of anything at that time pertaining in England. In an incredibly short time the spirit faded and it was replaced by almost precisely those administrative manners which had their *apogée* in England under George III. But in France the consequences were worse, for their patronage extended to the Prefects, Sub-Prefects and Mayors of all the localities. The evil penetrated all the members of the State. For every entity which strove for power: the cliques around the throne, the husbands of beautiful women, returned *emigrés* conscious of their family's services to the ancient royalty, clerical and anti-clerical, Ministers and Deputies, Republicans, Napoleonists, the Centre, the Right and all the other varieties of Parliamentary groups, old noblesse and new noblesse, upper middle class of former creation or recent acquisition of wealth—each was covetous of jobs for itself, for its friends, for its supporters, as present rewards or promises for the future.

The genius of Balzac [2] has left for us a picture of those times; and he shows us in the matter of a single career that capacity, industry, and public spirit succumbed to incapacity, inertia and selfishness. Occult influence decided appointments and promotions among the 30,000 officials, and this influence had nothing at all to do with ability to carry out administrative tasks. The results were lack of subordination, since the power and status of the superior were never upon a steadfast foundation; lack of incentive, since dismissal and promotion could result from adventitious causes; and the swelling of the numbers because jobs were a currency which all sought.

'Serving the State to-day', says Gixion, 'is not like serving the Prince, who knows when to punish and when to reward. To-day, the State is every

[1] Cf. Bonnis, *Principes d'Administration Publique* (1812, 3rd Edn.), Vol. I, Introduction; e.g. p. 152 ff.: 'All officials in the administrative system are and ought to be nominated by the prince, because they are his direct agents for the execution of the laws and the management of public affairs, and because, being the guarantor of such management, selection ought to be abandoned to him. Otherwise, it would be to will the effects without willing the necessary causes, because the causes would not produce the effects. Further, these officials participate, by the nature of their functions, in the Government of the State, since without them the prince could not act. To act it is necessary for him to have in his power the means of action, and these means depend upon his choice, without which his moral responsibility would be null, his action paralysed, because he would no longer have at his disposition the knowledge of men, place and time.' So also in regard to promotion, dismissal, etc.

[2] In *Les Employés*, dated July, 1836.

one. Now, everybody is not concerned in anybody. To serve every one is to serve no one. No one is interested in any one. A clerk lives between two negations. The world has no pity, has no respect, has no heart, no brains: it is an egotist, it forgets to-morrow the services rendered to it yesterday. In vain can you search within yourselves to find . . . that from the tenderest infancy you had a talent for administration, that you are a Chateaubriand as regards reports, a Bossuet as regards circulars, a Canalis as regards memorials, or the genius of dispatches. There is a law of fatality against administrative genius; the law of promotion which results from it. This fatal method is based upon the statistics of promotion and the statistics of mortality combined.'

Attempts at Reform. From the time of Napoleon to the Third Republic, France lived, with occasional but reprehensible lapses, under a bureaucracy thus composed. And in that time although there were reformers pertinacious enough to cause discussion of reform legislation there was never a majority in favour of reform. Even when there were majorities in favour of the major premise: 'All offices should be filled only by the capable', and successive majorities for secondary premises and the detailed conclusions which followed, by the time the Chambers arrived at voting upon the entire syllogism and its legislative embodiment, the majority had mysteriously disappeared. It is a brave class or clique that will disown itself, and the evils which Balzac portrayed are described again and again in the periodical *rapports* made by parliamentary commissions well down into the Third Republic. There were many legislative attempts at reform,[1] but though they were made by the best parliamentary leaders, perhaps because they were made by those who stood above the common level they failed, with the result that the French Civil Service is to-day regulated by a number of unco-ordinated statutory clauses, a vast number of decrees made by successive governments, and the jurisprudence of the *Conseil d'État*.

All attempts at making a general *Statut* were defeated. Why? It is clear from the parliamentary proceedings and manœuvres concerned with each attempt that only in recent years has the administrative efficiency of the Service come to rank even as important as other factors in government and society. In the decades between the return of the Bourbons and the Third Republic the desire to limit the arbitrariness of government was uppermost in the minds of the opposition, while those in authority insisted upon the need for free discretion. Until recent years, indeed, the whole régime was in peril: hence the power to control the Service was fought for on both sides as the power to appoint only the friends of the régime. This caused undue emphasis upon the *sovereign* power of the Government, whether royal or republican, to make appointments as it wished. Hence, even Parliament accepted the view that the terms of recruitment should be settled by

[1] They are best reviewed in Lefas, *L'État et les fonctionnaires*, Paris, 1913; this includes the project Briand-Maginot of 1911. I have verified Lefas' account by examining the various *rapports* he quotes.

royal *ordonnance* or *règles d'administration publique*. This placed the burden of care for efficient administration upon the Ministers: they could not bear the burden, and they abused their power. Further there was never a coincidence of the attitudes of the Government, the Chambers and the Civil Service. Each took a different course according to its own particular exigencies, and these never coincided: hence, although many projects were introduced and pressed they always failed. Moreover, in the Third Republic, even when it was well established, no Government was sufficiently agreed upon a project, nor was there a Cabinet majority to support it in the Chambers for a time sufficient to secure the passage of a law: there were Government projects and the counter-projects of the Chamber and its Commissions, and though the differences between them were sometimes small they were large enough to cause the downfall of the measures because the Government was too preoccupied, too unstable and too short-lived to carry anything through. The Civil Service Statute is the will-o'-the-wisp of French politics. The ultimate question is, why there was not such agreement upon their matter that a measure was possible. The ultimate answer is that French politicians are interested in other things than efficient administration: and the existence of jobs is exceedingly demoralizing. The result was to cause pressure for arrangements more extreme than elsewhere: for syndicalism, and councils of administration instead of a Minister in each department, to act as the employing and disciplinary authority. However, the claims of efficiency had to be met, foreign experience, the example of private industry, and the manifest need of administration were the impulses,[1] and the French pursued a path peculiarly their own. Even as far back as 1843 Laboulaye had suggested the idea of a special school of administration, from which the departments would be supplied. Nothing, further, is more constant in French parliamentary reports than the view that it is impossible to regulate all departments of the Government on the same principles, as in early years and substantially to-day in England. This was, in part, an attempt at obstructing reform, for if uniform rules could not be found they could not be applied, while *different* rules for each set of officials made the business so complex that either it was left to the individual Minister's discretion or was left unregulated, and, indeed, there were the usual obstructive arguments about the impossibility of testing aspirant

[1] Cf. *Rapport* Dufaure, *Moniteur*, 12 July 1845 (p. 195): 'The delegates of the executive power, those to whom especially belong the name of public officials, have upon society an effect at once considerable and continuous. It is through them that power directs everything, surveys everything, protects all rights, touches all interests. They are, each in the portion of authority confided to it, *authority in action*, manifesting itself in regard to every citizen; necessary intermediaries. The Government knows, only through them, the needs and wishes of the governed; some of the governed never see the Government, except in the officials who approach closest to them.'

officials by examinations. In part, however, it was the almost unconscious acceptance of the principle that previous training, competition, and recruitment should be *special* to each kind of situation. The English *general* examination was not accepted: the German law training was rejected. Even as the technical schools produced engineers for the roads services, so could various special schools produce the administrators for the various other services of government. French law and practice are therefore based upon two main principles: (*a*) the service open to the talents [1] and (*b*) the talents trained by a special education and selected by special tests for each department, the nature of the training and test being decided by a rule of public administration [2] for each department.

(*a*) Thus, the law excludes the refusal of an office to a citizen on grounds other than his 'capacity, virtues and talents', but there is a certain means of escape for the appointing authority in the jurisprudence of the *Conseil d'État*, which says that public manifestations of certain political, philosophic or religious opinions might be grounds for exclusion, for such opinions might *show* that the person was incapable of fulfilling the particular office he sought.[3]

(*b*) The power to determine the rules of recruitment lies with the Chambers, the President (where Parliament has not made a law on the subject), Ministers, to whom the President delegates the appointing power, and who have the power to regulate in detail the power given them by law or Presidential decree.[4] Most of the rules relating to recruitment, promotion, and organization of the departments are made on the basis of the laws of 30th December 1882, Article 16, 31st April 1900, Article 35, which provide that the central offices of each Ministry will be regulated by a decree in the form of rules of public administration inserted in the *Journal Officiel*, and no amendment can be made except in the same form and with the same publicity.

The conditions of recruitment of the officials corresponding to the British Administrative Class and the German Higher Civil Service, are settled by a number of rules of public administration, e.g. diplomatic and consular service,[5] Ministry of the Interior,[6] Ministry for the Colonies,[7] Ministry of Labour [8] and others.

[1] Constitution, 1791, Art. 6; 1793, Art. 5; Nov. 1848, Art. 10: 'All citizens are equally admissible to all public offices, without any other motive of preference than their merit and following the conditions which shall be fixed by the laws. . . .'

[2] The rule of public administration cannot be made without previous consultation of the *Conseil d'État*, which cannot veto the rule but may comment upon it. The simple executive rules are made without submission to the *Conseil*.

[3] Cf. Jèze, *Revue du droit public*, 1912, p. 453 et seq., on the *Bouteyre* case, and its implications, and cf. Duguit, *Traité*, III, 199 ff., who denies this limiting power.

[4] For the legal details cf. Jèze, op. cit., II, 450 ff.

[5] Decree 28 October 1926.

[6] Arrêté 24 July 1926.

[7] *Decrees 23 May 1896 and 31 December 1922.*

[8] *Arrêté 10 June 1927.*

The chief characteristics of these decrees are: (*a*) almost all central officials are regulated by them; (*b*) the universal prevalence of competitive examination, in the main entirely *open*; (*c*) for the administrative grade (*rédacteur*), competition is by examination and oral examination; (*d*) the technical character of the examinations; (*e*) the demand for previous proof of successful education; (*f*) the wide age limits for entry into the Service; (*g*) the departmentalization of the test. Let us give some examples. (1) *Rédacteur* (Ministry of the Interior).—For this position, which is the equivalent of a subordinate in the administrative grade, the following are authorized to take part in the competitive examination: members of the executive grade who have had at least two years in the Service, past students of the École Normale Supérieure, or men with a *licence en droit, lettres* or *sciences*, doctorate of medicine, or diploma of the *École Libre des Sciences Politiques*, a diploma of the *École des Chartes*, of the High School of Commerce, etc., etc. This is to guarantee a certain level of education. The candidate must be under thirty. (Other Departments: between twenty-one and twenty-eight, up to twenty-six . . .) In this case candidates must be permitted to enter the examination by the Minister: in other cases entry for the examination is automatic after only conditions of nationality, army service, medical examination have been fulfilled. The examination consists of two written tests, and oral tests. The written tests are (1) the making of a report, description, or comment on any of the general topics of a short list and (2) on any of a number of special topics. These all fall within the field of interest of the Ministry of the Interior or are cognate to it. There is no test in general knowledge, no general essay, no test of the mother-tongue as in the English system.

The oral test does not consist as in England of a quarter-hour of desultory conversation ending with the belief that the Board of Interview knows the man's character, but in oral tests upon the subjects contained in the list of examination subjects. Further, the candidate is given a set of minutes to study for a quarter of an hour and is asked then to dictate a letter on the subject for five minutes to a typist. For each part of the examination marks are awarded from 0–20. Then they are weighted thus: General Question multiplied by 5; Special Question by 5; Oral Question by 3; Dictation by 1. The Examining Commission consists of the Secretary-General of the Department, or the Personnel Director (President); a Director of the Department; three Principals; one Assistant (as Secretary). This body sets the examination and rates the candidates.

Without entering into the question of admission to the examinations, whether by previous interview as in the Ministry for Foreign Affairs, or the various types of diplomas as in other Departments, let us notice that in the former the written examinations (for the

diplomatic and consular service) are on diplomatic history, economic geography, public international law, while for the *Conseil d'État*, constitutional, political, and judicial organization, law in its many branches, economics, are required, for the *Inspection Générale de Finance*, the emphasis is placed upon mathematics, public finance (law and administration) and economics, similarly in the Ministry of Finances; while in all of them the oral examination is based upon the subject-matter of the written examination. In the examinations for the Ministry of Agriculture emphasis is placed upon rural economy and the law relating to agricultural credit, co-operative societies, public instruction regarding agriculture, etc.[1] Once accepted into the Service by this means, the *rédacteur* moves by regular stages to the top of this class, and may by promotion reach the supreme positions of *sous-chefs* and *chefs de bureau*.

Very little more can be said about the upper branches of French administration since statistics are not available and information regarding favouritism is not obtainable. There is favouritism, but more, to-day, in promotions than in recruitment. The contrast with England and Prussia is remarkable: for these countries have a unified examination system, non-technical in nature, and conducted by a body outside and independent of the departments. Yet there are some good potentialities in the French method: for (1) it draws the candidate *ab initio* to the department in which he wants to serve, (2) it requires always a study of the economic and social background of modern State activities, (3) it brings the members of the department (as examiners) face to face with the candidates into their hierarchy, with the possibility of a better choice from the standpoint of public efficiency and smooth co-operation in the Service. There are also disadvantageous potentialities: (1) the personal contact of heads of departments with candidates may very well result in favouritism, (2) the special knowledge may be narrow and superficially acquired. Criticism of the examination methods hardly exists: the French were happy enough to escape from pure 'spoils'. But one great scholar, at least, prefers the English system because he believes it produces men who can *think* as distinct from those who have merely mastered a special field of knowledge;[2] 'a varnish which cracks and scales off at the first contact'. Jèze believes that a general education would be enough, since most Servants will never attain to really high rank until very late in life, if at all: why then require technical knowledge at entrance?[3]

[1] Cf. for details the various decrees; some are given as a supplement to the calendar of the *École Libre des Sciences Politiques*; Rue Saint-Guillaume, Paris; cf. also Bourdeaux, *Les Carrières Administratives*, Paris.

[2] Jèze, op. cit., p. 466 ff.

[3] Loc. cit.: 'Given the age of the candidates at time of entrance, the extent of the syllabus for the competition does not often imply even a general culture. The candidates have very superficial knowledge, a varnish which cracks and scales off at the first contact. We ought to renounce encyclopædic programmes.'

He believes that there should be a general-culture examination at entrance, then, for promotion, technical examinations at successive stages. But this raises the more serious question of whether examinations at a later age are a just method of finding capacity. With all respect to Jèze, I am afraid that he has been misled by Lowell (whom he follows), for he deals only with the examination and the subjects of the examination as determinative of culture: but the vital question really is the nature of university teaching, and I venture to say that this may, according to its character, give a general culture with very technical subjects and certainly with constitutional and administrative law and economics and political science, and an ossified pedantry to the most liberal subjects of education. Jèze and others also criticize the too great range of the syllabus.[1]

As regards the examining bodies, Jèze believes their composition to be conducive to co-optation and favouritism, and suggests the addition of independent experts.[2]

Lefas deprecates an attitude of hypercriticism regarding favouritism in official appointments,[3] and on the whole our own investigations bear this out. There are rules, rules of considerable merit, and the law and the administrative courts provide amply against gross abuses.[4] Even the old loophole, not unparalleled at one time in England, of entry through private secretaryship to the Minister, has been largely blocked: up till 1911 members of the '*cabinet*' of the Minister were legally unregulated except by certain contradictory decisions of the courts: in 1911 a law provided that any appointments to public office from the Ministerial Cabinet or Under-Secretaries must be notified in the *Journal Officiel* before the resignation of the counter-signing Minister or Under-Secretary. Nor are ordinary Civil Servants who are appointed to a Ministerial Cabinet treated other than as the normal rules provide, in regard to promotion.[5] Yet this only requires publicity for an appointment made, it does not rule out or limit such appointments. Now the decrees to which we have so far referred concern only entrance into the administrative grade, they say nothing about the higher stages—*chefs de bureaux*

[1] Cf. Dubois-Richard, op. cit., p. 264 ff: 'A young man who wishes to succeed at the Polytechnique, after having passed the *baccalauréat*, is obliged to pass every day in his infancy and youth so many hours at his desk that he cannot find time to form his person and personality. Culture loses in depth, and even more in harmony, what it usefully gains in extent.'

[2] Chardon (*Le pouvoir Administratif*, 1911) believes that examinations *under* than a *single* department and not intermittent (which separate departmental examinations can hardly avoid being) would raise the level of candidates, and render easier the assimilation of departmental grades.

[3] Cf. White, *Civil Service in the Modern State*, Article by Lefas, p. 266 ff. Cf. also Barnier, op. cit.. 'In most of the public services competition is to-day the basis of recruitment and free selection by the Minister, by the prefects and even the mayors, has been singularly reduced.'

[4] Cf. Jèze, II, 473 ff. [5] Law, 13 July 1911, and cf. Decree, 13 Feb. 1912.

and *directeurs*, the equivalents of the English Assistant Secretaries nearest to the Permanent Secretary. These are usually filled by promotion from those in the Department and after many years of conspicuous service; but some occasionally are appointed from the Ministerial Cabinets. However, too much weight ought not to be attached to the explanation of the humorist: 'Examinations are often made for fools who cannot get placed otherwise!'

U.S.A.

American experience of administration has been vastly different from anything we have so far described, for the offices of State and their services have been used to an extent and for a span of time —until 1883—unparalleled in any other country, as the 'spoils' of the victorious political parties. The reasons for this have already been given in part, and will be treated again presently.

The important thing now is to determine the extent to which political favour or technical merit operates in the existing system. In the fiscal year ending June, 1930, the Federal Authority employed in the Executive Civil Service [1] about 609,000 officials. Of these 462,000 were subject to competitive examination on all the rules of the Civil Service Commission.[2] The rest, some 140,000, or nearly 25 per cent. of the total, are appointed by other persons, it may be upon technically good rules of efficiency, it may be entirely out of political considerations. They are the offices in the gift of the politicians from the President downwards, by the President with confirmation of the Senate, or by Heads of Departments, but some have been subjected by Presidential decree to objective tests of merit. How is the 140,000 constituted? The largest quota, comprising perhaps 98 per cent., consists of Post Office employees [3] and artisans and unskilled labourers,[4] and subordinate and temporary custodial and manipulative officials. The others, or some 3,000 offices, consist of the high directive and technical headships of the departments and ancillary bureaux in Washington and in the 'field service'. Many of the 98 per cent. are subject to no objective tests of merit by any agency; and only a small proportion of the 3,000 offices represented by the 2 per cent. are anything but political 'spoils', and it is this 2 per cent. which coincides with the English administrative grade in its highest reaches, going down in some cases as far as what English students would define as the higher reaches of the Executive Class. Then, out of the 98 per cent., the postmasters of the 1st, 2nd and 3rd class, numbering about 15,000, are examined by the Civil

[1] This includes, of course, servants of the legislature and the Courts.
[2] Therefore called the 'classified' Civil Service.
[3] About 100,000 = employees and postmasters of the 1, 2 and 3 class and 'star routes'. Fourth-class postmasters were put into the classified service many years ago.
[4] Most of these are subject to rules of entry.

Service Commission, which then presents three candidates for each post from whom the President and the Senate appoint one.[1] In the 98 per cent. also there are some 2,000 customs and revenue officers subject to no rules of appointment, but are Presidential-Senatorial nominees.

Let us put the matter in another way. In the U.S.A. at the present time most technical posts, but not all, are filled by those who have been selected by the Civil Service Commission, and practically every post below that of Minister downwards to the Executive Class in the non-technical and merely administrative posts, whether in the capital or outside, are political appointments. But this does not connote the non-existence of a class of Civil Servants equivalent to the English and German administrative grades appointed by merit: only, the Americans have classified their Servants in technical terms and prescribe technical examinations for them. Below the rank of 'bureau chief' which is headship of a branch of a department come the clerks of various ranks and these are appointed by merit down as far as the unskilled labourer positions, exempted from the normal Civil Service tests but not from special tests which have in fact been established. Yet almost all offices down to and including the level of bureau chief are political appointments. What is this political stratum? It includes the Heads of Departments who are Cabinet Ministers, and properly, as in Europe, political appointments. Then, according to European practice, there might be a political under-secretary. In the U.S.A. there are one or more political 'assistant secretaries' for each Department. Next, we should expect to find the Permanent Secretary, a professional appointment, at the head of a large staff of professional Civil Servants going down through all ranks in the capital and the provinces to the industrial staffs. Not so in the U.S.A. In the first place there is no counterpart to the Permanent Secretary and his immediate Deputy with authority over a whole Department. The next officers are chiefs of various bureaux either independent of the Departments as the Government Printing Office, or subdivisions, rather independent, of the Department. These are directed, not by a Permanent Secretary, with a staff of Assistant Secretaries and Principals as in England, but by the political 'assistant secretaries', and then by the bureau chiefs. In other words, there is no professional officer linking and directing all the bureau chiefs. What, then, of the heads of Bureaux? They are, according to a recent investigation, 'the key figures in national administration.'[2] Are they professional

[1] Cf. Annual Report, Postmaster General, U.S., 1930, p. 120, Table 26, and Report, 1925, Miscellaneous Tables, No. 2, gives about an average of 2,000 dollars per year salary.

[2] MacMahon, *American Political Science Review*, 1926, pp. 548 ff. and 771 ff., and 1929, p. 383 ff.: 'Selection and Tenure of Bureau Chiefs in the National Administration of the U.S.A.'

administrators? Some are and some are not. Their positions, created by various congressional statutes, are in the gift of the President and confirmable by the Senate. So are the deputy chiefs and assistant directors immediately auxiliary to the Heads. Altogether, these number between seventy and eighty.[1] The question now is this, what are the traditions of appointments to the Headships? These vary.

'Some are avowedly held to be proper fields for purely political appointments. In others, the head virtually holds during good behaviour; his removal by the President for purely political causes would be deemed a gross abuse of power. In still others tradition has not yet taken permanent form; a removal for purely political reasons would provoke adverse criticism from the opposite political party, but would not be regarded very seriously.'[2]

MacMahon deals with fifty-four heads of bureaux. Of these he shows that twenty-two were appointed without formal restriction by the President and the Senate. The other thirty-two are chosen by the head of the department, that is a member of the President's Cabinet, and they fall *normally* in the 'classified' service. He shows, then, that twenty-six of the fifty-four are appointed by merit (four-fifths of whom by promotion), that three are appointed by the test of merit, examination and previous service in the department, that fourteen served in their bureaux or corporate employment previously, and were promoted by President and Senate; and that eleven had no previous experience in Federal administration prior to their appointment. Even in the last class capable technicians have been appointed. However, the risks of political favouritism exist, and some of the offices have been subject to unfortunate breaks due entirely to this. There is no certainty that the capable Civil Servant entering by a lower rank will, except in thirty-two cases, and even less, arrive at the top of his particular professional branch.

Nor is that all. Within the 3,000 superior situations subject to Presidential and Senatorial appointment, a large number of other officials, for example, legal officers, solicitors, auditors, are equally political appointments. There are many in the field service of the customs and internal revenue branches, in the immigration and the land offices. Moreover the diplomatic and consular services are regulated only rather weakly by executive orders.[3] There are also miscellaneous situations 'excepted' from tests by the statute creating them.

[1] I take something over fifty as Heads of Bureaux and the rest as deputies and assistants.

[2] Mayer, *The Federal Service*, written 1922, and concerns thirty-three 'presidential' bureau chiefs, p. 100 ff.

[3] Cf. Mathew, *The Conduct of American Foreign Relations* (Edn. 1928). This explains the complicated arrangements for choosing and training diplomatic and consular officers. Competition is limited to nominees of Senators, three for each vacancy.

This is not a desirable condition, and it has both political and administrative disadvantages. We have already dealt with the political vices of the system. The administrative disadvantages are plain: the incapable are appointed, the 'tone' and direction of departments and bureaux are subject to frequent change, the casual incumbent is not really interested in the fate of the subordinates, while the subordinates not only suffer from insuperable political obstruction to promotion, but suspect the political forces even more than they deserve. Incentive to technical excellence is reduced.

If the professional administration is lacking at the top, who conducts the work year in year out? Probably more falls upon the 1,200–1,500 of chiefs of divisions, chief clerks and officers in charge than in other governments. Now it is a truth borne out by the general experience that in the grades below those which we have consistently called the administrative, the nature of the entry test and therefore of the education implied becomes technical in the sense that it requires either special knowledge of office routine, computation, etc., or knowledge of the law and practice of the particular services of the department. Thus the American system by keeping the highest offices in politics, left only the routine ones in the Service (of course, excluding 'technical', 'scientific', 'professional' occupations), and has divided administrative leadership between (*a*) politicians who are amateurs and pass from the field soon, (*b*) subordinate clerks and (*c*) technicians. It is not a good direction, and the best American critics seriously deplore the results.[1]

However, as can be seen from the figures given, the mighty days of spoils have passed away, and the Europeans who still have 'spoils' in their minds when they speak of the U.S.A. ought to modify their images very seriously. The largest amount of 'spoils' are in the State and municipal services: the Federation has cleaned itself.

The Psychology of Spoils. How did it become sullied and what were the stages in its purification? Those in power in the State, whatever its form, monarchy, oligarchy or democracy, are always likely to abuse their power to make appointments to public office; they are, at any rate, normally more likely to do this than to subject themselves to the prohibitions and difficulties required by attention to the public well-being. The public well-being is so impersonal and intangible when it is considered in all its comprehensiveness and remoteness, while the satisfactions to be obtained by following personal caprice in appointments are immediate and vivid. When one's own good is the first consideration, as for example, in business, the conditions for the appointment of those best qualified to produce what is required are present, and in the long run, if bankruptcy is to be avoided, prevail. But the public

[1] Cf. Willoughby, *Principles of Public Administration*, Chap. VI.

service has results often impalpable, distant from the vicinity of the maker of appointments, and it takes a great deal to ruin a whole nation by wasteful organization and extravagant payments to inefficient servants. Hence it is not a matter for surprise that a 'spoils' system should have grown up in the U.S.A.: the amazing thing is that a democracy spreading over an area of thirty-two times the size of England should ever have limited that system and controlled its own worst impulses for the establishment of a system of appointment by merit; as Montesquieu has said, a democracy has peculiar need of virtue, for when, in other régimes, inefficiency is observed, there is the refuge of democracy, but if the people themselves lack virtue, where shall one turn? Yet a democracy is peculiarly liable to demoralize its administration; for its basic tenet is the equal worth of all men, while its fundamental machinery is a party system. The former causes all to demand a place, the latter must be stoked into continuous service by the provision of concrete satisfactions, money payments, honours or public office.

We do not wish to describe in detail the process by which the Federal Service of the U.S.A. proceeded from 'spoils' to proficiency. Suffice it to say that the system of spoils began on a minor scale and apologetically with Washington, Jefferson and Adams, became a torrent in 1829 when Jackson came into office, and from that time until 1883 swept through all the offices of government without legal let or hindrance, and most usually without moral inhibitions. From 1883, when the Civil Service Commission was established, civil service positions were successively 'classified' and subjected to objective rules of appointment, and the 'spoils' system was steadily contracted. The questions which interest us are: (*a*) what were the discernible motives of the 'spoils' system; (*b*) what were its effects, its machinery and the impulses to reform.

(*a*) (1) Spontaneous friendliness, conviviality and generosity produced and produces spoils. We have to steel ourselves against such impulses to confer benefits upon our elective affinities, those who please by their manner, but especially our relatives. The lust of prestige, the feeling of power and virtue which nepotism produces, are very seductive, and besides these things, the chances of being applauded for services to the republic, especially in a party system of government, are faint. Moreover, it is easier to give away what belongs to the unseen public than what belongs to yourself. Vicarious generosity is one of the plagues of the world.[1]

(2) A more powerful motive in a democracy is the maintenance of your view of the Constitution, the laws and their proper applica-

[1] Fish, p. 59: 'In 1821 John Quincy Adams said that one-half of the members of Congress were seeking office, and that the other half wanted something for their relatives.'

tion.[1] It is argued that none will know this so well as your own political nominees, and none will be so zealous as they. Hence an impulse to proscribe all opponents or neutrals, and to appoint only indubitable friends. It is no argument that opponents are technically efficient: that is an argument in favour of their proscription.[2] Better an incompetent supporter than a competent enemy. As a Massachusetts Republican Minister preached in 1811, 'But if ye will not drive out the inhabitants of the land from before you, then it shall come to pass that those that ye let remain of them shall be pricks in your eyes and thorns in your sides, and shall tear you in the land where ye shall dwell'.[3]

(3) In a democracy, based as it is on party organization, the need for some commodity with which to induce and repay electoral services is great, and the greater it is the larger the number of elective offices. In the U.S.A. this motive to create and use 'spoils' was exceedingly strong, especially from the 'twenties onward through the joint effects of the rising tide of democracy and the increasing area of settled Government.[4] This was the main cause of 'spoils'.

(4) There were factors known jointly under the phrase 'the rotation of office'. The theory that office should not be held for long periods by the same incumbents and that every one should have a chance of office was put forward and practised from a variety of motives: as a means of stopping government from becoming a caste alien to the people,[5] as a means of maintaining the responsibility of officials to the people,[6] and that in a democracy, based on the idea of the freedom and equality of citizens, all should have an opportunity.[7]

As soon as one party began the system of proscribing enemies and relatives the other party was obliged to do so; and the question then

[1] Cf. Jefferson (cited Fish, *Civil Service*, p. 35): 'If the will of the nation, manifested by these various elections, calls for an administration of Government according with the opinions of those elected. . . . This (removal of and replacement of officials) is a *painful office; but it is made my duty and I must meet it as such.* I proceed in the operation with deliberation and inquiry, that it may injure the best men least, and effect the purposes of justice and public utility with the least private distress; that it may be thrown, as much as possible, on delinquency, on oppression, on intolerance, on ante-revolutionary adherence to our enemies. It would have been to me a circumstance of great relief, had I found a moderate participation of office in the hands of the majority. I would gladly have left to time and accident to raise them to their just share. But their total exclusion calls for prompter corrections. I shall consult the procedure; but that done, return with joy to that state of things, when the only questions concerning a candidate shall be, Is he honest? Is he capable? Is he faithful to the Constitution?'

[2] Lincoln used the 'Spoils' system to build up the Republican party. Cf. Fish, p. 170 ff.

[3] Cf. Fish, p. 97. [4] Marcy's speech and cf. Fish, p. 156.

[5] Ellbridge Gerry: Rotation 'keeps the mind of man in equilibrio, and teaches him the feelings of the governed, and better qualifies him to govern in turn'. Fish, p. 81.

[6] Ibid.: 'a check to the overbearing insolence of office'.

[7] Jackson's message.

became, who would stop first? When that received no answer, the question became, could enough members of both parties stop at the same time, and how could they be induced to do so?

Not until 1883 was this question really answered, although the reform movement had begun over a decade before; and it was answered by a few politicians of abnormal decency with the help of the National Civil Service Reform League. But first, of the effects of the 'spoils system'.

An enormous number of offices, most in fact, fell into the hands of the politicians. Every four years a large clearance was effected, and during each presidential term other violent changes occurred. Sheer inefficiency was the first result; an increase in public costs the second; the creation of a class of office-seekers the third; political corruption the fourth,[1] a standing battle between the President and the Senate for the control of appointments and removals a fifth; and a terrific waste of time and labour on the part of the President and Heads of Departments coupled with the real pain of refusal of applications for office, the sixth. Never had a State been so debauched. Officials were chosen through the loosely jointed machinery of Congressmen and the local party 'bosses'. Moreover, the parties preyed upon the office-holders' salaries, by 'assessing' them at so much per cent. for contributions to the campaign funds, and this again caused a counter-pressure for higher salaries, so that indirectly the parties were paid by the State. Finally, the political appointees were obliged to be politicians all the time to secure their future reinstatement. Worse still, politics and administration fell into public contempt.

How could the State continue to exist without governmental downfall? Even in a 'spoils' system some good officers are chosen; and even in a 'spoils' system there is not a clean sweep at every party change, since the newly elected executive has regard to its public prestige and has a modicum of regard for the public thing, and once elected it is independent for four years. There were Presidents who stood out against the removal of capable officials. Further, a long spell of office by the same party mitigated the revolutions in the service. Then it takes a great force to damage public administration very badly and very obviously. Finally, not until the 'seventies and 'eighties did the pressure of a complex, technical and expectant civilization cause the Federal authority to become active on a large scale requiring urgently a body of permanent and specially skilled officials.

[1] Cf. Henry Clay (1829): 'Incumbents, feeling the instability of their situation, and knowing their liability to periodic removals, at short terms, without any regard to the manner in which they have executed their trust, will be disposed to make the most of their uncertain offices while they have them, and hence we may expect immediate cases of fraud, predation and corruption.'

Through what instrumentalities had the 'spoils system' worked? Of course through the powers of appointment and removal. According to the Constitution what were they? The Constitution says that

'the President shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public Ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments'.

As to the power of removal, as we have shown, it is disputed whether it is an unlimited and illimitable power of the Executive, or whether the Senate must be consulted, and whether Congress, having established an office and settled its tenure, thereby limits the Presidential power of removal.

What of the evolution of these powers? (*a*) 'Ambassadors, other public ministers and consuls, judges of the Supreme Court' and all other officers, not 'inferior' officers that is, at least heads of departments, were left to the tender mercies of the politicians, that is the President and the Senate. The history of these officers is the history of political appointments - some justifiable, others not. (*b*) Over the rest of the 'officers' Congress may exercise power, and it may operate by giving authority to the President, with the advice and consent of the Senate, the President alone, the heads of departments, and the courts of law. On this basis Congress has committed the bulk of the high administrative and technical offices to the mercies of the President and the Senate [1]; it has committed the postmasters, the collectors of customs and internal revenues, registrars and receivers at land offices, district attorneys and marshals, officers of the Army and the Navy, and the public health service and geodetic survey to the same system—this is the bulk of contemporary spoils; it has vested some power in heads of departments, and these, too, are liable to patronage, where Congress has not stated the mode of the appointment which it has the perfect right to do.[2] Finally, after long years of administrative demoralization and with great reluctance, it established an agency, the Civil Service Commission, with power to recruit by merit, the officials which the President had the discretion to classify. This has given rise to the 'merit' system for at least seventy-five per cent. of the whole of the federal service.

An intense struggle was needed to produce the amount of merit that there is in the Service, and the issue was complicated by these causes. First, the Congress was anxious to keep power out of the hands of the President and the heads of departments because this was

[1] Cf. Mayer, p. 33.

[2] Cf. *U.S. v. Perkins* (1886), 116, U.S. 483.

to strengthen the Executive, and give the Executive the power to overcome the separation of powers (which was a dogma) by the use of patronage. Hence the chief preoccupation of Congress was rather to limit the removal power of the President than to increase his appointing power. Next, by an unfortunate faith in the short periodicity of offices, laws were passed establishing *four-year terms* of office for many official posts. This, the instrument of the theory of 'rotation of office', was an application to administrative office, of measures taken, properly, to secure the dependence of responsible assemblies upon the people. By a series of laws of 1820, 1851, 1872 and 1894, tens of thousands of officials in the customs, land, postal and immigration services were made appointable for four-year terms. All these officers must seek reappointment and face the possibility of not being reappointed, every four years. In these circumstances, even where the Civil Service Commission examines the officers (as in the case of the postmasters), the examination can never be a real way of providing good officials owing to the insecurity of the situation. The four-year term is an encouragement to political favouritism. All classified offices and many others established by Statute are permanent.

Thus there is still 'spoils' and mal-organization. Yet we must not leave out of sight that compared with 1880 and the previous one hundred years a remarkable purification has taken place. Why and how? It seems that the exceptional irregularities in the Civil War period due to the extension of Government activity, had awakened attention to the problem, but the example of England in the preceding decade began to have its full force upon travellers and certain parliamentarians like Thomas Allen Jenckes, Carl Schurz, George William Curtis, much above the average of their colleagues. By 1872 Civil Service Reform had got into the party platforms, and in 1876, Hayes, the Republican candidate for President, and the favourite of the reformers, was elected President. This was followed by the appointment of Carl Schurz as Secretary of the Interior, and the commissioning of Norman B. Eaton (afterwards first Civil Service Commissioner) to write a history of the Civil Service reform movement in Great Britain. The 'political assessment' system came to be detested by office-holders and people, and was the source of permanent reproaches between the political parties, thus spreading the knowledge of abuses among the electorate. In 1876 Congress passed an Act prohibiting the making or the payment of assessments among all servants or employees not appointed by the President and Senate. This and the Executive Order implementing it were little heeded. A Senate investigation committee of 1879 [1] showed (*a*) that the assessments were raised on a regular system, 'follow up' letters being sent to defaulters, and (*b*) that the President had approved the circular asking for contributions. The practice of

[1] Report, 46th Congress, 1st and 2nd Sess., No. 427, p. 2.

assessments continued in the election of 1882.[1] In 1881 the National League for Civil Service Reform had been established; and there were in several states small associations already at work. A case was fought before the Courts, and they held that the law against 'assessment' was constitutional, and the offender, the New York Republican Committee Chairman, was guilty. At about the same time fraudulent arrangements were made by the second Assistant Postmaster-General and various subordinates to increase the number of certain special postal services and increase the pay for existent ones—profits to be shared. The propaganda of the reformer frightened the parties into inclusion of reform on their platforms. The evils had been fully exposed in the House Committee's report of 1868.[2]

An attempt at improvement had already been made in 1871. A congressional statute had authorized the President to prescribe such regulations for admission in the service 'as may best promote the efficiency thereof', and ascertain the fitness of each candidate in respect to age, health, character, knowledge and ability 'for the branch of the service into which he seeks to enter', and for this purpose to 'employ suitable persons to conduct such inquiries'. The President also obtained power thereby to regulate the conduct of persons appointed to the Civil Service. However, Congress having given the President this power proceeded to give little or no money for its execution. The result was the concentration of the reformer upon a new and more comprehensive statute. Neither party wished to spoil its chances for the Presidential election of 1884: the Democrats were in sight of power, the Republicans were within an ace of losing it. For the few all-important votes an important, if unpleasant, concession had to be made. The reforming Congressmen, 'exceedingly holy and wise', as an opponent called them, pressed. The Senate, led by Pendleton of Ohio, and acting upon a Bill drafted by Eaton the historian of British Civil Service Reform and the New York Civil Service, after a long and mainly scoffing debate,[3] passed the Bill by 38 to 5, thirty-three members being absent, while in the House 155 were in favour, forty-seven against, and eighty-seven abstaining. In the Senate the majority was composed of twenty-five Republicans and thirteen Democrats; in the House, of 102 Republicans and forty-nine

[1] E.g. Thomas, *Return of the Democratic Party to Power in 1864*, p. 85: 'Great political battles cannot be won in this way. This committee cannot hope to succeed in the pending struggle, if those most directly benefited by success are unwilling or neglect to aid in a substantial manner. We are on the skirmish line of 1884 . . . unless you think that our grand old party ought not to succeed help it now. . . . It is hoped that by return mail you will send a voluntary contribution equal to 2 per cent. of your annual compensation, as a substantial proof of your earnest desire for the success of the Republican party this fall. . . .'

[2] Cf. 40th Congress, 2nd Session, II, No. 47.

[3] Cf. Senate Report, 47 Cong., 1st Session, No. 576; *Cong. Record*, 47th Cong., 2nd Session, 200–67.

Democrats. In the Senate the opposition were Democratic votes, the absentees mixed; in the House opposition and abstainers were well mixed among the parties.

The Civil Service Act of 1883 is the legal foundation of the system of recruiting the officials to the non-Presidential-Senatorial positions, and of their various rights and duties, especially political. What are its main features?[1] (*a*) It gave the President the power to appoint by and with the advice and consent of the Senate, three persons, not more than two of them adherents of the same party, as Civil Service Commissioners, to constitute the United States Civil Service Commission. They are removable by the President alone. (*b*) Their duty is to aid the President, *as he may request*, to prepare suitable rules to carry the Act into effect. These rules once promulgated it is the duty of all officers of the U.S. wherever the rules pertain to help them into effect. (*c*) These rules shall provide, 'as nearly as the conditions of good administration will warrant', (1) open competitive examinations to test the fitness of applicants for the public service *now classified or to be classified*; (2) the examinations to be practical in character and to relate to fitness to discharge the duties of the service into which they seek to be appointed'; (3) the offices of each class to be filled by those graded highest at the examinations; (4) the offices in Washington are to be apportioned among the various States and Territories on the basis of their population; (5) a period of probation precedes absolute appointment; (6) necessary exceptions from the rules are to be stated in the rules, and reasons to be given in the annual reports of the Commission; (7) the Commission is to conduct the examinations, make an annual report to the President for transmission to Congress, giving, among other things, suggestions for the more effectual accomplishment of the Act. (*d*) Excluded from the effect of the Act are labourers and workmen and persons nominated for confirmation by the Senate.

To whom, now, did appointment by merit apply? It applied to the clerical positions already 'classified' by an Act of 1853,[2] and a list of positions similarly to these. Then the Act provided for the progressive classification of other servants by the initiative of the President and the help of the heads of departments.

The dynamic power was then given to the President, and the history of 'classification', or additions to the Service recruited by the Civil Service Commission, is since then a history of the courage and vacillations of the Presidents,[3] the exigencies of party warfare and the

[1] Cf. an Act to improve and regulate the Civil Service of the United States (16 Jan. 1883, 22 Stat. 403). For the law and regulations and executive orders relating to the Service see any Annual Report of the U.S. Civil Service Commission (Government Printing Office) Appendix.

[2] Cf. Mayer, pp. 41 and 47.

[3] Foulkes, *Fighting the Spoilsmen*.

craven fears of Congressmen, and the uninterrupted toil of the various Civil Service Reform Leagues.

With what result? The following table tells:[1]

Year	No. of Positions subject to Examination	No. of Positions in the Civil Service	Percentage Positions examinable
1883	13,780	131,208	10·5
1888	29,650	159,356	18·6
1893	45,821	180,000	25·45
1899	94,893	208,000	45·62
1903	154,093	301,000	51·19
1909	222,278	370,000	60·08
1913	292,460	435,000	67·23
1918	592,961	917,760	64·6
1924	415,593	554,986	74·8
1928	431,763	568,715	—
1930	587,665	608,915	—

This is enormous progress. Let us recapitulate the main features of the American system: (1) There are many important administrative and technical posts subject to political patronage; (2) There are many minor positions in Washington and the 'field' subject to political patronage; (3) Some of the first category are appointed and maintained on principles of efficiency, some in the second category, e.g. presidential postmasters and labourers are examined by the Commission, but in these cases three candidates are presented for each nomination by the President, confirmable by the Senate; (4) The great bulk of the service, professional, scientific and clerical, is appointed after open competitive examination by the Civil Service Commission;[2] by the rules[3] made by the President under the Act the Civil Service excepts, 'where the conditions of good administration warrant', certain positions from competitive examinations and gives instead *non-competitive* examinations; and there are exceptions possible (by Rule II, Section 3) from examination altogether,[4] amounting to several hundred in the central departments alone, without reasonable ground, having regard to their usual nature. There are certain exceptions *from civil service appointment by statute.* There are certain exceptions possible by Rule II, Section 10, where, when certain specific vacancies occur, people may be appointed without examination.[5] This has made possible appointments of special experts. Further, Executive orders make special exceptions of experts, but mainly of widows of former civil servants, 'for charity', about twenty to thirty a year.

The U.S.A. is not strong in its higher administrative service; but

[1] Figures from 1883–1924 from Annual Report C. S. Commission, 1925, VIII, 1928 and 1930 from the Annual Reports of those years.

[2] For its status and work, cf. D. H. Smith, *The United States Civil Service Commission*, 1928.

[3] Rule III, Sect. 2. [4] Cf. Rule II, Sect. 3, Schedule A.

[5] A list of them is given in the Appendix to the Annual Reports

it has other strengths : its attention to the theory and practice of classification, its experiments in tests for manipulative and simple executive officers, and its contribution to the theory of ' efficiency ratings '.

GENERAL CONCLUSIONS REGARDING RECRUITMENT

It is time to ask, what conclusions can be drawn from these studies of recruitment of the Civil Service.

1. The impact of natural forces is unrelenting, and finally prevails. As the knowledge of natural forces grows, men adapt the available power to make their lives richer and easier, and this imposes new habits upon them. The reserves of power, especially economic, increase for the whole community, but there is a constant shifting, possession and control of these reserves, from one social group to another. The State changes its purposes, or the purposes change the State, and concurrently with this change, the servants of the State take on a different character. In the history we have reviewed there is clearly indicated the change from sparsely populated countries of a largely rural character, living mainly on agriculture, in comparatively isolated localities, without any power save that of men's muscles, the horse's strength and the rudimentary harnessing of wind and water, to thickly-populated countries, largely urbanized, living in a tremendous territorial *continuum* where news spreads rapidly, and all men are economic partners whether they know it or not, using power derived from coal, oil and water ingeniously extracted, all operating in a social system the very props of which are Credit, Security and Continuity. And the Civil Service has, in response to this, shed patronage and taken on the character of one machine among many others, to be valued by its product and employed solely because it is efficient.

2. Not natural forces alone have produced the modern State and its administration. It will always be a nice and an ultimately insoluble problem where the influence of natural forces upon man's behaviour ends, and where the influence of innate desires and imperatives begins. To the influence of natural forces, we may, indeed, add without entering into this problem, the influence of the flux and reflux of ideas about God and man, mine and thine, which put the absolute State in the place of the feudal State, and the democratic in place of the absolute State, caused aristocracy to decline—in short produced an organization to embody and realize the modern social conscience. Its offspring in the domain of administration is the decline, though not the entire disappearance, of privileges of birth as the certificate of entry to public administration, the career open to the talents, and the creation of publicly-stated tests of talent.

3. These, however, are only general lines of evolution, and the State in fact more closely adapts the Service to its nature. Indeed

at times the coincidence of novelty in the State, that is, of a fresh constitution of authority, with the establishment of new instruments of administration is so striking that one is compelled almost to cry out: 'The State is Administration, Administration is the State!' This is most notable in the institution of the Intendants in France; the creation of the War Commissariats in Prussia; and the central power and the Justices in England. Withdraw these officials, and there is no State! All that remains is at the moment of withdrawal a condition of society and a complex of wishes in the men who constitute it. The coincidence is remarkable, also, in the evolution of the nineteenth century. One by one the qualities of the Civil Service are stripped from them by reformers conscious of new needs—what sufficed as preparation in one decade was already challenged in the next, and the solution found was obliged to give way to another. We have yet to ask how near the present arrangements fit the necessities. The economic activities of individuals and groups and the social obligations which men have seen fit to assume have already begun to influence the methods of choice.

4. The general result of development has been that Civil Services are now considered as the impartial instruments of the State, to be used by whichever political majority is in office. The officials are *expected not to withhold their best services from any political directors,* and the politicians are expected not to tamper with the established means of recruitment and dismissal from the Service. Of the officials' impartiality we will speak later. The convention that the politicians ought not to tamper with the established means of entry into the Service demands for its maintenance quite a rare type of mind. Let us make a large assumption at the outset—that politicians of all ranks are able to repress the desire to reward their friends with jobs—this is a large assumption, as we know from the history of both aristocracies and democracies. The magnitude of the assumption can be best realized perhaps by those who have fought elections and have faced voters during a canvass and zealous party-workers. It is the most difficult thing in the world for a person of generous temper to repress his readiness to reward. If, however, we rule out this true good nature falsely applied, there is still a serious temptation faced by the politician. In proportion to the depth of his feeling of righteousness he is likely to purify the administration of elements which contradict his ideals. Extract the baseness and chicanery from the '*épuration*' under the Third Republic in France, the early spoils system in the United States, the appointment of nobles and corp-students under the Prussian monarchy, and there is still left what appears to many minds to be a perfectly legitimate choice of friends and expulsion of enemies. If the ideal is worthy, can we stick at the means? The answer is this. In the modern State such arrangements would cause a lack of technical

capacity and continuity of administration which would reduce the efficiency of the party making the attempt. Secondly, not all the State agrees with the majority, and the minority under such a system of *épuration* is compelled to suffer not only from the policy of the majority, but from the inefficiency of the administration in directions not desired even by the majority. Thirdly, the rotation of offices must end in serious inefficiency, if not breakdown. The question the idealist has to face ultimately then is this: am I so certain of the eternal validity of my ideal to risk the destruction of the general instrument—the State—which serves me? At that, he would perhaps say, 'I had better stop; perhaps I had better mitigate my zeal, act tolerantly, and not kill the body—a State free from the imminent threat of violent discord and reprisals—which alone ultimately will or will not support my schemes'. It is the familiar capitulation of the Spirit to the Body. The difficulty, however, in the heat and dust of political life is that class, creed, family, sex are not separated and distinguished from the social ideal, and one masquerades as the other even in the mind of the political purist.

The type of mind, then, which can understand the need for an impartial and impersonally-selected Civil Service is rare, and the temptation to indulgence is constantly present. Only vigilance can prevent it.

5. We have not failed to observe that administrative progress under the monarchy in Prussia was more rapid than in democratic England. Monarchy is not necessarily corrupt: it depends upon the monarch and the traditions of his house. The monarchy which desires to survive must act in the same general fashion as the republic which courts survival—it must serve the people. It is not surprising, then, that under the Hohenzollerns the recruitment of officials was based upon impersonal tests

6. However carefully the regulations relating to tests for public service are drawn up, and however carefully the Service is guarded from the incursions of the inept, it is impossible entirely to exclude the personal element in choice where oral examinations or interviews form part of the test. By personal element I mean considerations which are unwritten and are contradictory to the spirit of the regulations. In the end, to the extent to which the oral examination and the interview are allowed to count in the total marks, we are obliged to rely upon the knowledge and character of the Board of Interview. Here those who select may easily allow private loyalties to overcome loyalty to the State. We are so little conscious of the State-in-itself, and so familiar with the State as it reflects from its facet of our individual selves—the parents we knew and their prejudices, our Church or Chapel, our school-fellows and University friends, our professional habits and connexions. But the interview cannot be omitted. The

psychological difference between an interview as used in private business and in public administration points the danger. In the former the employer knows in great detail the nature of the specific job to be filled; and capacity to fulfil its duties is preferred to adventitious qualities. The British Civil Service Board of Interview do not know the exact character of the situation. Men like Colbert, Turgot, Napoleon, Graham, Peel, Chadwick would have sent 'manner' and 'niceness' to the winds.

We can only hope that the ultimate custodians of the channels of recruitment will have acquired a sense of State. We can also draw as narrowly as the case requires the maximum of marks which may be given as a result of an interview.

7. We have observed the modern State grappling with the problem of how to select its officials. What has been the result of the struggle? The English method may be generally contrasted with the German method, and exceptions and exclusions may be made for other countries. The English method has resulted (comparatively) in the attainment of officials with minds open to the full variety of the possibilities in problems with which they are confronted. They are not over-restricted by formal learning, not bound to solutions provided by authority, nor dogmatic. They hold their learning easily and have acquired the gift of its ready application, with a variety of alternatives. They have a good training in criticism. There are probably more practical 'Why's?' engendered in the English Universities than anywhere else in the world. The writing of papers and the tutorial system result in the gradual acquisition of self-knowledge and the peculiar relationship of the students, the one to the other, arising perhaps out of the former aristocratic domination of the places at the Universities, in an ease of manner with one's colleagues, a certain fearlessness and candour of expression, sometimes attaining to conceit, and *hauteur* and nice-mannered insolence to inferiors. More than anything else is the sense of personal worth and self-confidence. All this makes for freshness of mind, resourcefulness, inventiveness. The substance of the historical constitution and economic studies—if these are taken—conduces to liberal relationships with Parliament and the public; and this end is also approached because the Present-Day Knowledge and Essay Papers not seldom require a familiarity with public affairs and controversies. Two quite obvious faults mar this system. There is under-preparation, and the preparation there is, is not quite on the lines required by the urgent tasks of to-day. First, there is no such preparatory service as there is in Germany. There is a term of probation, but this is extremely short and is passed through rather formally. The result is that society at large is not known by the official at first hand, even if he has studied the social sciences. And, secondly, as we have shown, the social sciences have not received the same weight

in the curriculum as the other subjects. My own feeling is that the time has come for a reconsideration of the curriculum and the inclusion therein of papers in Economics and Public Administration for all, and for an attempt to specify certain studies for particular departments. Arrangements also should be made for service with a local authority and a tour abroad.

While the English cultivate 'character'—the open mind, self-reliance, a critical attitude, all of which *may* lead to inventiveness when one knows enough to see what needs invention—German development has led to other virtues. Too much devotion to learning, and legal learning at that, has bred a heavy unpliable formalism. The critical attitude is largely overcome by the clear-cut certainty of positive law, and the tradition of learning. Native assertiveness, if it is there, is modified, if not entirely replaced, by timidity based on the chance of error. The general result is that the static elements have precedence over the dynamic elements: 'We have in Germany such an extraordinary number of dutiful, capable and conscientious officials, but among them we find so very few personalities who are able to lead.' There is no doubt that until recently the German Services have suffered from over-preparation, but the recent reforms which we have analysed are reducing this and have also made an appreciable stride towards giving the Social Sciences, Neo-Cameralism, the precedence which is their due in modern society. All this has been realized in Germany, and discussed with commendable conscientiousness. The end is not yet. For the advent of Parliamentarism is bound to exercise a loosening, liberalizing effect upon the Civil Service. They are now, as never before, obliged to come into contact, sometimes daily contact, with Parliamentary Committees, the members of which have not merely a representative and advisory power, but actually are responsible and politically powerful, and with representative deputations. The pretentiousness of the learned will therefore be challenged instead of being supported by authority, and its humiliations will be public not private. The law, in short, will become answerable, and we may expect therefore that lawyers will become more human.

In the human type which the training produces France passes in a good middle way between the English and the German, being more adequately prepared than the former, and less pedantic than the latter, but suffering the penalty of technical training—formalism. Its defect is the over-departmentalization of officials by their training. This is better avoided, since it is impossible to sever the work of one department from another, and there are enough causes of inter-departmental friction and non-allowance for each other's powers and difficulties without any added causes. The U.S.A. shares in this departmentalization.

In all countries there has been a tremendous improvement in the

serviceability of the administrative officials since 1875. The main cause is the abolition of patronage, the secondary cause the tests of efficiency. The latter have been acquiring more and more value as they have been approached with a rational consideration of their modern purpose. It seems to me that in the countries to which we have given attention the evolution of the future will most probably be upon lines even more similar, because the conditions the modern State has to fulfil are becoming so much alike. Western civilization—that is, a complex of ideals and a way of getting a living—has made these countries one in the most important respects. They all believe in (1) Progress, (2) Tolerance, (3) Efficiency, (4) a High Standard of Living: these four, added together, produce the Modern God, whatever the churches or churchgoers may say. The temples in which these deities are worshipped are: (1) Parliaments—'the people are the sovereign power', (2) Schools, (3) Factories and (4) Economic Groups and Political Parties. Because the early problems of the different States were so different, and because the countries were obliged to move in different directions, in order, first, to constitute themselves into the States, the administrative organizations became widely diverse. But science, communications and the economic process have made them more and more alike, and their roads converge. There will still be differences, but they will be the differences of natural position, though many of these will be frittered away. England may very well become more bureaucratized, through fear that internal dissension may weaken the country's war-power, now that aeroplanes and submarines have destroyed geographic isolation. The temper will alter and is, indeed, already altering. The effects of the inherited codes of law must become weaker against the law which is being made day by day as the exigencies of modern civilization hiss out their demands. There will be differences ultimately caused by the physico-psychological nature of men. But the general direction will be more nearly parallel than ever before.

8. We must, however, not be misled into attributing all virtues to the method of selection which imposes certain formal obligations upon candidates. The capable administrator is not made by diplomas alone, or his three or four years' study at the University. Already some of the blame for the formalism of the German Civil Service is placed on the lack of liberal studies at the secondary schools. It is argued that since 1870 these have so responded to the claims of the natural sciences that students enter the Universities without culture. And perhaps in the present state of secondary education in England it is better for the candidates for the Civil Service to have continued their general cultural development than to undertake specialized courses of study as a preliminary to entering the Civil Service. Not only the secondary school education has to be taken into account

in the preparation of the Civil Servant. As we have seen in the evolution of Germany and France, great value has been placed at various times upon the influence of family tradition, and there is no doubt that this is still of great importance. Incentive, social outlook, manners, morals are awakened and moulded, in a small proportion created, by the whole tone of contemporary society. We so easily learn to act by reference to the character of others. The general social expectation—what the world as a whole and our own country in particular thinks is 'done' or 'not done'—is on a par, in importance, with the formal training, and is a potent factor in setting the results of that training into motion during the official career. Strict training and lax social morals go ill together; they may help and they may hinder each other. The general acquisitiveness militates against disinterested devotion to work, for only a rare few are free of the claims of friends and family, a national devotion to authority and discipline produces its inevitable effect upon Universities and Administration alike. Accountability in a democratic State produces sensitiveness as to the abuse of official power and makes the official think twice before he undertakes a doubtful enterprise and the citizen ever-ready to challenge an abuse. It is possible but unnecessary to adduce many other examples. Hence, if we are to create a race of Guardians who are to help society to overcome its pains and futilities, society must agree to want such a race and begin to make itself worthy of its service.

CHAPTER XXXIII

THE PROBLEMS WHICH ARISE AFTER RECRUITMENT

THOUSANDS of people have entered the public service. Their existence gives rise to a set of problems which emanate from the nature of the Public, the Employer, and the Service, the Employed The Public demands efficiency, that is satisfactory service, the cost of which is not disproportionate to the satisfaction. The Service desires conditions of employment which it describes broadly as 'fair', that is, that it shall be rewarded in proportion to its productiveness, that no favour shall be shown to individuals, and that they shall have a say in determining the conditions under which they work. The problems are similar to those raised in modern private industry, especially in very large concerns, but the Public Service has some special characteristics which we shall find out in the course of our discussion of each specific problem.

In each of the questions we are now to raise there is this dual aspect: the public demand for Efficiency, and the Service demand for Fairness; and there is the complication caused by the fact that the employees serve the State. We shall discuss Promotion, Classification, the Disciplinary Codes and the control of the Services by the Public and the Law Courts.

(*A*) PROMOTION

It is the lower grades which are most interested in the arrangements for promotion. The upper grade has no obstacle external to itself to prevent its members from rising to the highest positions according to their capacity. But a social problem of serious proportions arises for those who have not been able to afford the education necessary to enter the higher grade, but who develop capacities and the ambition and desire which often accompany them. For the Service as a whole the impossibility of a proper outlet for this capacity means the loss of efficiency by resignation of the best officials, and a dreadful deterioration of *morale*, which occurs not only among the members directly affected, but among colleagues, and the sheer waste of talent which does not find its appropriate expression.

Now all countries give a rise in pay within the grade occupied—a stipulated annual increment from a minimum to a maximum. The

regulations arrange that these shall not be automatic, but shall be given or withheld as a reward for maintained efficiency or as a punishment for unsatisfactory work.[1] In the U.S.A. Civil Service the 'efficiency rating' system is designed to secure that promotion, demotion and retention in the Service shall depend upon tested efficiency.[2] That is to say the regulations especially direct that the increments shall not operate automatically; and certainly the tendency of thought in recent years—born of public dismay at the growth of the Civil Services—has been to demand the punctilious execution of these regulations. But this is a rare procedure, rarer, at least, than rewards and punishments in private industry. We will not at once analyse the causes of the mechanical increments, because the causes are intimately bound up with the whole problem of dismissal, demotion and discipline, and it is more convenient to deal with these incentives together. We are at present more concerned with real promotion, that is, a rise to a higher grade.

Opportunities for promotion are in all countries rare. In England before the reform of 1919 the Intermediate, the Second Division and the Assistant Clerks had certain outlets into the classes above them, but they were not many, and the opportunities varied from Department to Department,[3] owing, in part, to the variety of Departmental grades. Further, though regulated broadly by Treasury Regulation, the Regulation was interpreted differently in each Department. Finally, there were no formal processes for promotion; no written and comparable records of achievement. Such records were recommended by the Macdonnell Commission. On the whole opportunities for promotion to a higher class, though existent, were few *in proportion to the numbers in the lower grades*. When the Service was reclassified after the Reorganization Report of 1920 the opportunities were increased,[4] but the new Clerical Class (a compound of part of the Intermediate, the Second Division and part of the Assistant Clerks) still complain of want of opportunity.[5] What, in essence, is the source of the continual complaints of the lower classes regarding promotion? It has a threefold origin: the Service classes and their complements are fixed at strictly the number necessary for the work to be done, and this excludes a flexibility of promotional chances according to the contemporary availability of talent; the Civil Servant with some years' experience is embittered to think that others will come into a class above him upon recruitment by examination for which he, perhaps, had not the economic means, and that he will have to be subordinate

[1] Order in Council, Clauses 20 and 36. Cf. Macdonnell Commission, 4th Report, Chap. VIII, 3 ff.

[2] 37 Stat. 413, Act of 23 Aug. 1912, Sect. 4 *See infra.*

[3] Macdonnell Commission, 4th Report, p. 58 ff. [4] Ibid., Chap. VIII.

[5] Royal Commission C.S., 1929, *Statement of Case*, Civil Service Clerical Association, and Evidence of W. J. Brown, p. 70 ff.

to such entrants and perhaps, for a time, help them to learn their departmental jobs; and finally the tests often bring into the Service people too good for their jobs—they are too young to know this, and later fret at the standstill imposed upon them by rigid classification. This is a terrible problem and if a time should come when most modern utilities are socialized, the system might one day be violently disrupted by the restless spirits who seek advancement. Two things are clear, that, on the whole, the best economy lies in an increase of the posts open to promotion beyond that dictated merely by the work to be done; simply to give the lower grades a continuous feeling of opportunity, and *early* promotion is necessary.[1] In Germany there is no possibility at all of an Intermediate Grade official being promoted to the higher administrative class. At the most an official of long standing and experience may be entrusted with work of the higher grade as a substitute for a short time, but he does not become one of that body either legally or socially. (Somewhat similarly, Staff Clerkships in the British Civil Service are one outlet for the Clerical Service.) The relationship between the higher and the subordinate grades is indeed one of the current jokes. Arrangements have been made for promotion within the lower grades. Very similar arrangements exist in France and the U.S.A. as in Germany; that is, the upper grade is the preserve of specially qualified entrants (in the U.S.A. of political nominees and technically highly trained officials), and there is some circulation in the lower grades.[2]

Two questions are opened by these arrangements. The first is how far do these opportunities respond to the available talent and the demand for promotion? The second is, what are the tests applied to select for promotion? The first question is practically unanswerable, for there is no accurate gauge of the available talent or the extent to which members of the upper grade ought to make room for those promoted. In this lack of accurate standard lies all the force and heartache of the lower grades; for they, like all of us, are apt to assess their personal capacity much more highly than the outsider will; and none of us will admit that he is not above the average. It is probably true that the clerical grades are too highly educated for the work they have to do, and that much of their training and ability is wasted. For their tests are pitched at a height needed for their most difficult work, and as soon as they have learned their routine their everyday tasks make no increasing demands upon

[1] Cf. Macdonnell Commission, p. 61: 'It is, we think, indisputable that there is no worse training for the real duties of administration, which requires freshness of mind, individuality and judgement, than a long period of routine work, however faithfully performed; if, therefore, a man has sufficient superiority to fit him for administrative work this fitness should be ascertained as early as possible in his career.'

[2] For Germany, cf. Beamten-Archiv, V, 10; IX, 595; I, 331.

them. In private industry their talents would, in a number of cases —we must admit we cannot say exactly how many—respond to the stimulus of opportunities, self-made, self-sought opportunities. But in the Civil Service the opportunities cannot be made, and it is no use seeking them—for the opportunities depend upon the Establishment, and the Establishment depends upon Parliamentary supplies, and these in turn depend upon policy and public opinion—all matters which no individual Civil Servant can influence. The spirit of resentment in the lower grades is heightened by the fact that many are excluded from the full opportunities of the public service because they have not had the economic means to go through the training and pass the examinations set for the Administrative Class.[1]

The Rating of Efficiency. The second question offers an interesting insight into the nature of the State. The efficiency of the promotion system turns upon the means adopted to decide the relative merits of various public servants doing very much the same work. How close is the scrutiny, and how does it compare with the method of private industry? In private industry, particularly in the businesses of small and middle size, but less and less as the firm grows bigger, there operates an intensity of selective process, unknown in public services. The prevailing dictum is that 'none is in business for his health'. The motive is gain, and the understanding is that all should try to 'get on'. There is a certain fatalism in the 'get on' convention in that to have 'got on' is accepted as a sign of desert; rather than a standard of desert being set up to determine whether a man ought to get on or not. There is a certain ruthlessness exercised by both employers and employed. The employer wants the best person at the top, and the worst at the bottom, and the immediate index of the rightness of choice is the profit and loss account. Further, the relationship between employer and managers, and often even with individual workers, is close enough for the employer to sum up personal qualities. Nor is there any sense of colleagueship to prevent the expression of such a judgement. The tradition and spirit of private industry is all against it. The employer is accountable to no one: his own conscience, with its registry of economic loss and gain, pity, sympathy, delight in power and efficiency, is the ultimate test. Or, rather, the private employer is accountable—to the consumers; but they have so far shown inordinately little interest in anything save cheapness, plenty and quality.

[1] This, I think, is clearly discernible in the *Statement of Case to the Royal Commission* by the Civil Service Clerical Association, Royal Commission C. S., 1929, Chap. XVII, Promotion Avenues, Paras. 3 ff.: also Evidence of Mr. W. J. Brown, Minutes, Questions 4832 ff.

I think also that it is part of the spirit which in Germany has produced the movement for continued education of officials (they must get some outlet), the theories of administrative syndicalism in France, and the very large labour turnover in the public services in America.

Could not this system be introduced into the public services? To ask the question is to express its absurdity, impossibility, and to reveal the differences between public and private enterprise. To give an unlimited discretion into the hands of the higher officials, and to let loose ambition in the services, must ultimately cause the aggregate of salaries to rise or fall. Parliament would be presented with fluctuating estimates, and ought to examine the causes of fluctuation and attempt to relate the efficiency of the services to the increases or decreases. But that is impossible where the staff is so large and the services are not rendered to the public upon a price-system. If Parliament did not control, but permitted taxation to be raised to meet the increases without discrimination, I think we may take it that the salary bill would steadily rise. Or, suppose that it were forced down, there would be dissension among the staffs insupportable where the services to be rendered are as basic as they are said to be. The only egress from this difficulty, and, of course, it is the one taken by public services everywhere, is to lay down from time to time a set of conditions of employment which will operate fairly automatically; i.e. to limit the discretion of the superior officers and the opportunities and ambitions of the subordinates.[1] In private industry the variations of price, quantity and the quality cover all good and evil: in the public services the elements of good and evil in the conditions of employment largely predetermine quality and quantity. Public accountability limits the number of permissible alternatives in employment policy. Further, in a 'closed' service, that is closed off from the chances of independent development by the individual of useful and money- or prestige-earning services, the sense of interpersonal equity tends to become very strong, so that considerations of justice and fairness assume an important place. Hence a special emphasis upon impartial tests of the right to promotion: 'If we are dependent upon our superiors and not upon our own capacity in relation to the outside world, then our superiors' judgement must be subjected to equitable rules.'

Seniority and Merit. The satisfaction of the claims to advancement in the public service is therefore obliged to take place under certain forms and conditions. The tendency is always to fall back upon sheer seniority, for this method has much to commend it. It is automatic, and avoids the need for making invidious distinctions between one person and another, of placing the young over the old, of measuring the responsibility for the result of promotion.[2] (Its

[1] The system of 'lump-sum appropriations' to a head of a department, which permitted him a fairly wide discretion regarding rewards in his department, was roundly condemned in the U.S.A. as productive of serious inequity between men working in different departments. Cf. *Reclassification Commission Report*, 1920, p. 52.

[2] Jèze, op. cit., p. 505: 'Promotion by grade or class by seniority is very much open to criticism; it suppresses emulation, renders useless zeal and intelligence in

main difficulties are those of legal definitions of seniority.) It is safe for the official who is charged with making promotions. To any mistake he has made there is answer which goes far to dissipate any mistrust or grievance: 'The man has been in the office *n* years!' It satisfies a sense of equality. To the older people seniority is a defence against the new-comer; to the bulk of men and women who are not ready to run the risks of their avowed belief in themselves it is equitable and undisturbing. Indeed, for many situations seniority, up to a certain point, is advantageous—those situations are the simple routine clerical duties where long familiarity with office conditions is the best training for those who are to direct several subordinates.

However, both the controlling authority of the Civil Service on behalf of the public,[1] and the representative associations of the employees have agreed on the necessity for a more rational system—the former to secure efficient work, the latter, to institute tests of merit which shall not depend upon the personal favour of a superior officer. Such tests are, in respect to merit, difficult to devise owing to the lack of an openly competitive spirit in the employees, the absence of free enterprise and the inability exactly to relate the monetary value of each servant's work in the total produced by the Service; while personal favour can only be minimized, not entirely abolished.

The fundamental test of merit for promotion is now competitive records of past efficiency. Many American States have examinations for promotion and in some of the Federal Departments these exist,[2] but England, for the most part,[3] certainly considers these an interference with the ordinary official work of the candidate, and where the original test has been severe the need for a supplementary test is an unnecessary imposition; and in France it has been said that examinations for promotion are inappropriate, as officials must 'prove less extensive knowledge than initiative, judgement and tact',[4] and the theory of the inexaminability of elderly candidates has been propounded.[5] In Germany examinations are required for the promotions in the lower grade, but from two-thirds the way up the Service this ceases, and informal reports are used. The superior official simply keeps a fairly detailed record in a portfolio: the record is

the exercise of the function. Its only advantage is negative, it stops favouritism inherent in a discretionary power. The violent reaction against favouritism and the intervention of the politicians in the career of officials explains without justifying the place which is more and more given to promotion by seniority.'

[1] Cf. *Begründung* to Law on Salaries, Reichstagsdrucksache, 3656 (1927). 'Naturally one must have the right to promote capable officials beyond the limits of their normal career. This is an incentive especially valuable for all and by its use extraordinarily unique powers are awakened and made useful for all of us.'

[2] Cf. White, op. cit., Mayer, op. cit.

[3] Exception in the Customs Service.

[4] Caillard, *Rapport, Journal Officiel*, 3 Feb. 1907, p. 982.

[5] Vivien, *Études Administratives*, 96.

called *personalakt*, i.e. personal documents. These are kept up to date by frequent entries and revisions, but no mathematical calculations of merit are made.

A similar system is in existence, but less efficient, in France, and more than a suspicion of favouritism clings to the system of seniority which strongly prevails. In that country attempts have been made for many years to bring about a change in this system—to establish a legal proportion between the number of places to be attained by seniority and the number by merit—but so far as I am able to discover, none of them has ever gone beyond the stage of being referred to a Parliamentary commission.[1] The projects have also included arrangements whereby the promotions shall be determined by a Departmental Council upon which the rank and file of the staff of the grade in question shall have minority representation. At the present time promotions are made according to the Decrees regulating the Departments, in so far as these Decrees concern promotion but some omit to regulate it. When the French use the term *avancement* they are concerned with movement upwards in the same class, and also movement to higher grades. The former is more subject to seniority than the latter, and mainly gives the Servant a higher salary True promotion, that is, to a higher grade, is mainly at the discretion of the head of the department, which means in practice at the instigation of the superior officers. The law of 1912[2] attempts to secure a limitation of favouritism by providing for promotion lists, which are, in fact, generally drawn up each year, and by the head of the department in council with some subordinates. But this only limits political favouritism; it does not do more. This kind of limitation has a long history in France; and in fact the possibility of recourse to the *Conseil d'État* to maintain the principles of loyalty and sincerity to the spirit of the arrangement is a safeguard against dishonest promotions.

If we except a scheme made, but not yet put into execution in the U.S.A., the most reasonable system yet adopted is that of the British Civil Service. The system revolves around the Annual Report Form and the Departmental Promotion Boards. Posts with a salary of less than £700 a year are involved. The Report Form, reproduced overleaf, repays consideration. It prescribes a number of human

[1] Cf. Project of 1 June 1920, which provided for promotion by (*a*) examination, (*b*) inscription on a table of promotion, (*c*) special decisions It was arranged that in the promotions within the same class one-third at least were to be by seniority.

[2] 27 Feb. 1912, Art. 34: 'After the promulgation of this law no nomination or promotion in the central departments can take place of officials who do not figure on the promotion list at the time the vacancy occurs, except when the list is exhausted, or in the case of exceptions based upon *reasons of the service* upon which the council of directors must be consulted.' In the Customs and Registry Service there are examinations for promotion. Cf. Jèze, op. cit., pp. 495, 496.

Confidential.

MODEL FORM (Page 1).

ANNUAL REPORT ON MEMBERS OF THE STAFF (TO BE RENDERED ON 1ST JANUARY).

January 19 .

Annual Report on Mr. (Name).
..... (*Rank*).

Branch in which serving
Date of Birth
Date of entry into—
(*a*) Public Service
(*b*) Department (if different from (*a*))
(*c*) Present Grade

For instructions for compiling the report, see *page* 2 (*below*).

(1)	Above Average of Grade (2)	Average of Grade (3)	Below Av. of Grade (4)	Remarks (5)
1. Knowledge—				
(*a*) of Branch . . .				
(*b*) of Department .				
2. Personality and Force of Character				
3. Judgement				
4. Power of taking responsibility				
5. Initiative				
6. Accuracy				
7. Address and Tact . . .				
8. Power of supervising Staff .				
9. Zeal				
10. Official conduct				
General Remarks (including note of any specific qualifications not included above).				
Degree of qualification for promotion to next grade (*see* note 2 over).				

I HEREBY CERTIFY that in my opinion the conduct and standard of efficiency of the officer named hereon are as stated.

Signature
Rank
(Certifying Officer.)

.....
Remarks.

(HEAD OF SUB-DEPARTMENT.)

(*For Professional and technical qualifications as supplied by the officer*, see *form annexed.*)

Model Form (Page 2).

NOTES AND INSTRUCTIONS FOR COMPILING THE FORM.

(1) Insert in Columns 2, 3, or 4 the letter (*a*), (*b*), or (*c*) against each heading in Column 1 in accordance with the following order of appraisement:—

(*a*) Above average of Grade.
(*b*) Average of Grade.
(*c*) Below average of Grade.

(2) Against the heading, 'Degree of Qualification for promotion to next grade', an officer should be marked:—

(*a*) If eminently fitted for special and early promotion (if this marking is given the reasons for giving it are to be stated).
(*b*) If fitted for promotion but not for exceptional promotion.
(*c*) If not considered fit for promotion at present (if this marking is given the reasons for giving it are to be stated).

(3) The remarks Column (5) is intended for use by the certifying officer, and to enable him to draw attention to any exceptional degree of qualification in the marking.

The space at the foot of the form is for the remarks of the Head of the Sub-Department.

(4) These reports are to be regarded as confidential. If, however, an officer is marked 'Below average of grade' in any of the qualifications mentioned in the headings of the report, or 'not considered fit for promotion at present' for some cause other than inexperience or— where the Head of the Sub-Department considers it desirable for medical reasons— ill-health, he must be given in duplicate a written intimation that he has been so assessed under the particular heading or headings, with reasons where stated, and required to sign and return to the Establishment Officer one copy of the form of intimation as evidence that this direction has been complied with.

qualities, Knowledge (*a*) of Branch, (*b*) of Department, Personality and Force of Character, Judgement, Power of Taking Responsibility, Initiative, Accuracy, Address and Tact, Power of Supervising Staff, Zeal and Official Conduct. (It is an extraordinary thing that exactly ten qualities are enumerated—is it the addiction to Ten Questions in Examination Papers or the Ten Commandments which has caused this?) But the relative importance of these qualities varies with different posts, and the fitness of an officer for promotion depends upon his personal combination of those qualities requisite to the work in the vacant post. The further down the scale of routine work, for example, the more would Knowledge of Branch and Accuracy count; where the official comes into contact with the public, Address and Tact would be 'weighted'; in the management of other people, Personality and Force of Character and power of Supervising Staff would stand out. These qualities are then judged by the certifying officer as above, below or on the average of the grade. Exceptional qualities, good or bad, are included in the report. A judgement is then made whether the officer is (*a*) eminently fitted for special and early promotion, (*b*) fitted for promotion but not for exceptional promotion or (*c*) not fitted for promotion at present. If an official falls under the third

judgement or is below the average of the grade through faults entirely his own, it is part of the equity of the scheme that he shall be informed of this.

Vacancies for promotion are made known through the Promotion Boards which exist in almost every department. The Boards normally consist of the Chief Establishment Officer or his Deputy, the Head of the sub-department in which the vacancy occurs, and one or more other Departmental officers of experience and standing nominated by the Head of the Department.[1] In practice, of course, the only person who is likely to possess real knowledge of the candidate is his immediate supervising officer. The Board is compelled by the nature of its everyday preoccupations to rely upon his exact knowledge acquired in four or five years of critical observation than what it gleans from the Report Forms and conversation in a more or less hurried interview. Where it is necessary, additional evidence is called for, especially from the staff side of the Whitley Council of the department or of the district or office concerned. Any officer may make representations to the Head of the Department in regard to any promotion that has been made affecting him and the case is dealt with by the Head of the Department himself, with or without assessors, who remit it to the Promotion Board, or to a special advisory body for consideration, and from recent evidence before the Royal Commission on the Civil Service it is plain that a considerable amount of informal appeal from decisions is permitted. The members of Promotion Boards consider their duties among the most onerous they perform, for they are virtually condemning one or more aspirants to years, even decades, of their old work and a sense of frustration.

The Form is designed, as we have pointed out, to indicate qualifications other than those specified. This is indicative of a development which proceeds in Britain, so far, in the realm of aspiration, and in Germany practically—the institution of special schemes for the further education of Civil Servants. Ambitious employees and some among the high officials [2] long ago recognized the value of maintaining in the Civil Service a current of fresh ideas. The movement is partly cultural, in a broad sense, partly vocational. The result has been in Great Britain the establishment of the Institute of Public Adminis-

[1] These arrangements are now described, after some years of operation, in the various memoranda submitted by the Permanent Secretaries to the Royal Commission C. S.; and the evidence given before the Commission shows that they have been maintained with very great loyalty to the best interests of the Civil Service.

[2] Cf. Beveridge, *Public Service in War and Peace* (1920): 'If we are to have an increased number and variety of bureaucrats, it is essential to keep their souls alive, to get them to see all their work from a wider standpoint and in due proportion to the rest of the world. . . . It would, I am sure, pay the State definitely to assist and encourage the younger civil servants of all grades to follow some regular course in economics or political science and to give facilities for them to do so even in working hours.'

tration and the result of its joint endeavour with the London University —the Diploma of Public Administration—and in Germany a much more ambitious scheme, the establishment in several great centres of Administrative Academies (*Verwaltungsakademien*).[1] In England, the honours acquired through the instrumentality of these institutions are likely to count in the calculation of merit for promotion, in the future, but so far they are an innovation not yet invested with official recognition and reward; in Germany they already count, especially since for promotions up to a certain level examinations are prescribed.

What is gained by this attention to promotion? There is of course no complete exclusion of favouritism. For, if Reports and Personal Records are drawn up, yet some one has to do this, and the personal factor still persists. But certain things are gained. The first is regularity of report: this means that there must be recurrent attention to the relative merits of subordinates; the deliberateness at stated intervals conduces to conscious attempts at distinction, and though I have heard that in England and the U.S.A. there is always a tendency for the certifying officer to tar all with the same brush, so that the total marks tend to prove that all are equally meritorious —distinctions are made.[2] The qualities mentioned in the British Report Forms break up the vagueness of judgement into a number of more specific questions, answers to which can only be given by close attention to their purport. The second gain which underlines and makes effective the first is the heightening of responsibility brought about by the possibility of a representation against a flagrantly unjust promotion.[3] And, thirdly, the staff feels that this dispensation reduces the possibility of jobbery, that they are having a 'square deal', that causes for suspicion, and that furtive backbiting which is as bitter as gall in any 'closed' occupation, have been much diminished. The Royal Commission of 1929 has met the claims of Civil Servants even further—the precise terms of an adverse report are to be divulged, and sympathetic consideration is to be given to the institution of a Departmental Board of Review which will include a staff nominee (Report, 1931, p. 78). These are important gains and well worth the time and energy expended upon the operation of the system.

Two variations of the system are worth mention. In some of the American States, Wisconsin most notably, an authority outside the

[1] For an account of their work, see *Die Beamtenhochschulbewegung* (1925), published by the *Arbeitsgemeinschaft Deutscher Beamtenhochschulen*; and the periodical, *Beamten-Jahrbuch*.

[2] In one of the States of the U.S.A. the regulations compel the certifying officer to place the servants in defined grades of merit in such and such a proportion, i.e. he is *compelled* to make a distinction.

[3] The evidence before the Royal Commission, 1929, shows that such representations are made in individual cases.

Department is introduced as a check upon the judgement of the Departmental promoting officer; and in Australia machinery has been provided more completely than elsewhere to reduce the sense of grievance of officers who believe they are entitled to promotion but to whom others are preferred. The Wisconsin system is based upon a Report Form very similar to that used in the British Civil Service. Attention is paid to (*a*) record of work in the service, (*b*) capacity for growth and (*c*) knowledge of the fundamentals of the position to which promotion is sought. The information given in the Report by the Departmental superior is supplemented by the independent reports of the Civil Service Commission's Examiners. They visit institutions and departments, and according to a privately circulated report of the Civil Service Commission, 'In this work the examiner tries to get the officer to give a sort of word picture of each employee, noting especially those characteristics that are outstanding.' The kind of information obtained is, of course, a great contrast to the percentage marks, or comment upon the Report Cards.[1]

The advantages claimed by the Commission for this method of personal inspection are (1) the information is more significant and vital, (2) 'an appointing officer will gladly give an hour to talk over the work of his employer where he would consider the filling out of report cards as a bore, unnecessary red tape, put it off until the last thing, do it in a perfunctory way and wonder if the reports would ever be looked at by the Civil Service Commission'; (3) close touch between the Commission and the departments fosters a spirit of co-operation; (4) the Commission is able to observe the need for re-classification and learn how best to formulate the examination.

It is quite obvious that this system can only work where the Civil Service is as small as it is in Wisconsin. There one approaches the manageable size of a not-too-large firm, and these personal contacts are not too costly and can be conveniently arranged. Further, the smaller the number of things to be compared, the easier the comparison; and one mind carrying a single standard minimizes the possible aberrations of judgement. Such a system could only work

[1] Here are some examples of which the Commission is proud. 'Mr. C. has a tendency to put off. He is slow in making reports, apt to get fussing and spend a lot of time on one thing to the detriment of others. He is thorough and competent but does not seem to properly organize and systematize his work, to cover efficiently and on time the various duties falling to him' Then again: 'Catches on quickly to directions and the significance of her work. Not a clock watcher. Attends regularly to business. Has a genuine interest in her work.' Let us give two more examples and we shall finish. (1) 'Miss A. is the sole support of her mother; is earnest; has been found working long after hours on her own initiative.' (2) (From the general text of the report) 'Just the other day a girl of this type (independent, with initiative, disliking too many directions) who has been in the service for some time was considered for another position, but knowing her temperament and also that of the officer wishing a secretary, we were sure that her appointment to this position would be a case of putting together the wrong human chemicals.'

well in a large Civil Service if the number of the inspecting staff were large. The British Civil Service is perhaps twenty-five times as large as, and the Prussian and Imperial and French Civil Services even larger than, Wisconsin's. The difficulties are commensurately increased, more than commensurately, indeed, for the larger the number of human beings engaged in a task, the more difficult the agreement upon a single standard upon which to judge the officials they inspect. The solution is then one of two: either the establishment of basic principles and forms of comparison, or (and) the decentralizing of selection for promotion. These are the inevitable effects of the largeness of the modern State and the vast number of Civil Servants it is bound to keep under a more or less centralized rule. At a certain point the economy of large-scale organization seduces the ordinary man and woman from their longing for self-government.

Australia. The second variation from the ordinary promotional methods of large States is Australian and shows the influence of industrial democracy upon the public services. From the outset, when the Australian Federal Service was established in 1902, the Public Service Act and Regulations laid it down that efficiency was to count as much as seniority in promotion indeed, it was later established that efficiency was prior to seniority in the judgement of promotability, and only when efficiency was equal should seniority be calculated. Promotions are made by the Public Service Board,[1] the extra-departmental authority over the Civil Service, upon the advice of the Head of the Department. The employees are given really extraordinary safeguards the effectiveness of which is guaranteed by well-organized machinery. A promotion is gazetted, but for a certain time it is provisional. Within this time an appeal may be lodged by a civil servant who considers he has a better title to promotion. The court of review consists of one member of the Civil Service Commission and a representative of the Department's higher staff. The question is argued before these by the appellant personally, or through any other *official* he nominates from the Public Service Association of which the appellant is a member. The official whose promotion is appealed against also has the right to put his case before this Court. Where the appeal is successful, the appellant is promoted; where it is disallowed, the provisional appointment becomes absolute.

Considerable use is made of this machinery.[2] For example:

[1] System inaugurated by the Act of 1922; cf. recommendations of Royal Commission on Public Service Administration, p 45 ff.

[2] The figures are taken from the *Annual Reports of the Public Service Commission. Observe that the number of applicants for disputed promotions is much greater than* this number: in 1927, 1,331, in 1928, 1,906, in 1929, 1,419. About one in three of the appeals is on the ground of equal efficiency and greater seniority. The rest on grounds of superior efficiency.

Year	Promotions	Appeals	Appeals allowed
1923–4	1,200 (about)	73	7
1924–5	1,264	114	9
1925–6	2,077	463	47
1926–7	2,304	944	48
1927–8	1,888	405	56
1928–9	2,405	698	87
1929–30	1,812	557	77

The rights are no mere dead letter, and it does not take much acumen to guess that the Court will be kept at work in an increasing measure. The conclusions to be drawn from this institution are clear. The judgement of the promoting officer is under examination. He acts under the threat that, say, one out of ten of his decisions will be appealed against, and since he cannot know which of the ten it will be, he is led to be careful in every case, and to rule out of his grounds for judgement those which would be untenable before the Public Service Board, which wants efficiency, and the associations, which are determined not to have any favouritism. It is a salutary check upon the official superiors, especially in so politicized a country as Australia. But there are secondary considerations. The promoting officer, against whose decision an appeal has been successful, must be placed in a very awkward position *vis-à-vis* his staff, and especially the successful official. There must be some loss of subordination. Perhaps this is worth suffering if it purges bitterness from the Service, and enhances the sense of freedom. Against the loss of efficiency from insubordination one has to weigh its increase from the increase of vigour and contented work caused by the abolition of personal grievances. It is natural that there should be many appeals; the increase in the few years of operation goes to show, perhaps, that the spirit of appeal will be encouraged whether there is any justification for it or not.[1] But a large number of years' experience will be necessary before an adequate amount of material for judgement is at hand. There is no penalty for a frivolous appeal: indeed the off-chance costs the official nothing. That may be found to be a mistake. The appeals against disciplinary measures have had a longer history and have already caused serious vexation and expenditure of time and energy.

The developments we have traced in the solution of the problems of promotion are indeed instructive. It would surely be an amazing

[1] *Report of Public Service Board*, 1927–8. p. 19: 'The Board is definite in its opinion that never before in the history of the Commonwealth Service have the interests of the officers in the matter of promotion been so fully safeguarded as under the present system. . . . That the percentage of appeals allowed by the Board is on the whole small is abundant evidence not that the system of appellate jurisdiction is defective, as has been represented in some quarters, but that much care is exercised by the Department heads in making their selections for promotion to vacant offices.'

sight to the average high official of two generations ago, and to the majority of members of representative assemblies, to see this loosening of the position of unchallenged authority over the subordinate staff. The limitation and control of the hierarchical power is indeed remarkable; and it is entirely due to the democratic spirit and the growth of industrial representation. A few generations ago, men were moved by a degree, almost incomprehensible to our generation, of fear that any challenge to the chiefs of the hierarchy temporarily incarnating the State would issue in social disorder. Curious old theories of duty and subjection to the State, a sternness based upon vague and unquestioned prejudices, religious, family, economic, supported this attitude. The other belief, that out of freedom issue strength and efficiency, has gained much ground, as well in other directions which we shall discuss soon, as in this. And further territory seems yet to be won.

(*B*) EFFICIENCY AND THE RATING OF CAPACITY

The U.S.A. and Classification. The common notion is that Civil Servants have life tenure of their positions. This is nowhere true in law—for the law arranges for their dismissal or pensioning on grounds of redundancy or inefficiency. Yet in normal times, that is when no great changes must occur (as after a war), the Civil Servant has come by practice to enjoy practically a life tenure, with superannuation to follow. What are the grounds of this system? Some are the result of accidental, some of essential, causes. In the former class are the origins in royal tenure when the master would maintain favourites in office regardless of efficiency; the exceedingly confidential-authoritarian nature of the crown servant of earlier days; the undue reaction against spoils. Among the more recent and essential causes are the desire of the chiefs to save the trouble of change, the pain of dismissing others, the pressure of Civil Servants and their organizations (which is now paralleled in private industry), the fact that the Civil Servant is induced to educate himself to a certain standard for the Service and to take the prescribed examinations, the desire to get good work by the promise of permanent employment (and special conditions regarding discipline, civic rights, etc.). These motives have been reinforced in their effect by the difficulty of measuring the efficiency of Civil Servants. What cannot be measured must be endured, lest one is mistaken or accused of injustice and favouritism. It is notable that with the increased consciousness about the importance of the Civil Service, and the improvements in the technique of rational employment methods, every Civil Service bestirs itself to challenge the notion of necessary permanence in office and the rigidity of its conditions.

The quest of efficiency, then, has led to attempts to expel the

atmosphere of security and automatic advancement that persists in the public services, and this obviously depends upon whether efficiency can be 'rated'. No country has gone further in this than the U.S.A., at least in theory. Its work may, when we have described it, seem pedantic and pretentious, but not a little of the world's progress has been won by such work. Two things have combined to cause the U.S.A. to push the mechanism of 'rating' efficiency further than development elsewhere. The first is the fact that the Federal Civil Service (and the State Civil Services, for that matter) operate in a social environment intensely individualistic and acquisitive; the lack of other traditions, the freshness of the social adventure, the spectacle of fortunes extorted from nature and fellow-men—all conspire to add a keen edge to the mental weapons of these gainful and self-realizing human beings. The Civil Service cannot avoid measurement in terms of this environment. Its collective and its individual services cannot be rated in a fashion very different from the Ford works or the Chicago stockyards. Individual service, efficiency, advancement and reward are inseparable terms: so are inefficiency and demotion (the opposite of promotion) and dismissal. Secondly, there is a tremendous interest in 'personnel problems', Taylorism, scientific management, and 'human engineering'. These two influences, the individualistic acquisitive temper and the enthusiasm for scientific management, were strengthened in power by the general inefficiency of the personnel methods which long before the War generated a strong and persistent reform movement.

From 1913 practical attention was turned towards the problem of heightened efficiency. A small new division was created in the Civil Service Commission called the Division of Efficiency with power 'to investigate the needs of the several executive departments and independent establishments with respect to personnel and for the investigation of duplication of statistical and other work . . . etc., etc.' In 1916 a Bureau of Efficiency independent of the Civil Service Commission was created to give effect, among other things, to the law of 1912 prescribing the establishment and use of 'efficiency ratings' in the public service.[1] This law provided (Sect. 4) that

'The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment *with such frequency as to make them as nearly as possible records of fact.* Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency.'

[1] Cf. Weber, *Organized Efforts for the Improvements of Methods of Administration in the U.S.A.*, 1919; and cf. Short, *National Administrative Organization of the U.S.A.*

But no real investigation or progress took place until the appointment of the Re-classification Commission in 1920. This conducted one of the finest pieces of investigation ever accomplished in the history of public administration. Its terms of reference were the investigation of rates of compensation in the Civil Service and to report 'what re-classification and readjustment of compensation should be made so as to provide uniform and equitable pay for the same character of employment. . . .'[1]

The Commission interpreted its terms of reference very broadly and found itself concerned with three main problems: (*a*) promotion, (*b*) the relationship between efficiency and movement upwards in only one class and from class to class, and (*c*) classification of the service.

As regards (*a*) and (*b*) the findings of the Commission were:

'that no uniform practice exists in the advancement of efficient employees at either salary or rank, both of which are commonly referred to as "promotion"; that salary advancements proper are controlled by administrative officers, while true promotions are usually made as the result of non-competitive examinations; and that lack of assurance that efficient work will receive suitable reward injures the morale and reduces the efficiency of the entire service'.[2] 'Because of the absence of any centralized control over promotions and advancements, it is impossible to generalize about the methods in selecting persons for advancement when a vacancy occurs. Some offices maintain fairly elaborate systems of efficiency ratings, and have a carefully developed plan for using them, including advisory committees, and some use an examination system for certain classes. In other offices the selection is made by the administrative officer with only such advice and assistance as he may choose to seek in the particular instance. In such offices the whole question turns on the administrator's knowledge of his force, his fairness and his judgement.'[3]

Equity as between the various kinds of work done in the Service, and efficiency and good morale within each department, depend in the first instance upon a proper classification of all the Services, and the problem of equitable promotion is dependent on the problem of proper classification. This is the lesson also of the Civil Services of Great Britain and France.

Now the Civil Service Act of the U.S.A. and its applicatory Rules[4] provided jointly that the higher positions in any grade should be filled by promotion unless no one was capable of filling the position vacant, and that promotions would only legally occur by examination or exemption therefrom by the Civil Service Commission. But, as the Re-classification Commission observed, promotion was, in fact, badly organized, and the United States has suffered the brunt of the

[1] Act, 1 March 1919, Sect. 9.

[2] Part I, p. 20. Report, Congressional Joint Commission on Reclassification of Salaries, 12 March 1920; 66th Congress, 2nd Sess., Document No 686.

[3] p. 54. Cf. also Mayer, op. cit., 310 ff.

[4] Sect. 7 of the Act of 1843, and Rule X, 1.

two results of this: for more people than was necessary 'blind alley' occupations existed, and secondly there was a tremendous 'turn over' of employment, to which the petrification of opportunity was undoubtedly a contributory cause.[1] Although the Re-classification Commission advocated competitive examinations for promotion,[2] its recommendations of the use of 'efficiency ratings' to be regularly made in the departments and checked by a central supervisory bureau were later given effect, and this system has been made the principal basis of the promotion and demotion system. Now before 'efficiency rating' can operate there must be some way of comparing like with like, and this brings us back to the problem of classification, an indispensable foundation of equity and efficiency in any great organization employing large numbers of officials.

(C) CLASSIFICATION

The problem of classification may be thus defined: to set all servants to work which is not too difficult nor too easy for them to do; and then to treat all who do equal work, equally, and where there is a difference in the amount and quality of work done, to proportion reward to service. Upon proper classification depends the efficacy of recruitment, the possibility of creating a rational promotion system, and the equitable treatment of people working in different departments. The experience of all countries shows how necessary is such classification, though indeed it is very difficult to establish and to maintain a developing Service, and practically impossible to satisfy the individual Civil Servant that he has been rightly placed in any particular category.[3] Without categories there is no calcula-

[1] *Twelfth Finding*: 'The Commission finds that there is a serious discontent, accompanied by an excessive turnover and loss, among the best trained and most efficient employees; that the morale of the personnel has been impaired; that the national service has become unattractive to a desirable type of technical employee; and that the Government has put itself in the position of wasting funds on the one hand and doing serious injustice to individuals on the other, and of failing to fill that degree of efficiency in administration that a more equitable and uniform wage policy would bring about.'

Cf. p. 55: 'While most employers, for the sake of maintaining a virile organization, are willing to pay the cost of recruiting and training a limited number of persons to fill vacancies, they have come to regard an excessive turnover as an unnecessary expense and wholly undesirable.'

'The turnover rates for the five consecutive periods (eliminating temporary employees and reductions of force) are 10 per cent. for the fiscal year ending 30 June 1916; 16 per cent. for 1917; 38 per cent. for 1918; 40 per cent. for 1919; and 33 per cent. for the first half of the fiscal year 1919–20.' (Author's Note: Of course in these post-war years a great reduction ought to be made because of the general uncertainty and reorganization of economic life.)

[2] pp. 123, 124.

[3] Cf. the appeals against classification in the Canadian Civil Service. Dawson, *The Civil Service of Canada* (1930), Chap. IX Cf. also the argument of the Secretary of the Civil Service Clerical Association. Royal Commission U.S., Minutes of Evidence, loc. cit. Cf. Australian Civil Service, Report Public Service Commission, 1923.

tion, no comparison, no relative assessments and evaluation; and in a Parliamentary State, particularly where publicity and government by political amateurs necessitates easily grasped facts and figures, control ceases where categories end. Yet it is the placing in categories which is bitterly resented by the restive, the ambitious and the growing; and only the paramount necessities of a control which has ceased to be personal, because the thing controlled is of too great magnitude, can justify its deadening effects. Even the crab, said William James, would very likely be filled with a sense of personal outrage at having itself classed as a crustacean and would say, 'I am no such thing. I am Myself, Myself alone.' But the State is too large an employer to be able to make individual bargains with each of its servants; such bargains would make Parliamentary control quite impossible; nor is there any accurate standard available to the Public Service, within itself, which could be used as a basis for the exact calculation of such individual contracts. The least amount of evil in State service is produced by the best classification.

This is what the American inquiry fully realized, and indeed, no one contemplating the situation of the American Federal Civil Service at the time of the inquiry could have failed to realize the significance of proper classification. The only statutory classification in existence was a very old one, which divided the Service in clerks of four classes, First, Second, Third and Fourth. But the growth of the Service, the lack of attention to re-classification, the spontaneous creation of Departmental designations and the curious way in which appropriations were passed in the Congressional system—where neither Treasury nor Cabinet, nor President, nor Congress compared the Estimates of the individual Departments all contributed to complete chaos. This unfortunate development received no effective check from the Civil Service Commission, for under the United States' system of appointment and examination the individual Departments and classes were taken separately and arrangements made especially for them. The Re-classification Commission found

'That the Government has no standard to guide it in fixing the pay of its employees and no working-plan for relating the salaries appropriated to the character and importance of the work for which such salaries are to be paid, and that the designations of positions now appearing in the book of estimates are inaccurate and misleading'. [1]

There were clerks, Class I, at 1,200 dollars, Class II, at 1,400 dollars, Class III, at 1,600 dollars, and Class IV, at 1,800 dollars, all performing the work of a position requiring the same duties and qualifications, and carrying with it the same degree of responsibility.[2] *Congress was puzzled by the titles and cheated by the change of them—*

[1] p. 44. [2] p. 47.

'Because of the practice of basing rates of compensation upon title of position only, it is not an uncommon occurrence to change the title of a position without change of duties so as to increase the salary of the incumbent.' [1] Considered both inter-departmentally and intra-departmentally—

'Equal pay for equal work as a standard of employment does not prevail in the U.S. Civil Service. To secure the application of such a standard some centralized agency would have to be forthcoming to say what the wage should be and to see that that wage and no other is being paid. The Government has had no such agency. Salary fixing is almost completely centralized. In view of this situation it is not in the least surprising that the statistics compiled by the Commission show that the Government frequently pays very much more to some employees than to others for the same work.'

For example, Junior Examiners in the Department of the Interior received 1,200 dollars, while those in the Treasury received 1,400 and 1,800 dollars. All the ambitious, therefore, sought transfer to the Treasury: and if they obtained it their previous training in routine was wasted and they further had to spend time in acquiring a new routine. The inequalities make transfer from one Department to the other—very desirable, within reason, as it prevents stagnation—a difficult process, since the salary differences operate as obstacles to free movement. Rational criticism and reform of promotion methods were impossible since these varied from office to office, and meant something different in each department. The consequence was the degeneration of the morale of the service which could be expressed statistically by the turnover of jobs which in 1916 was 11 per cent. The way out of this administrative morass lay in instituting conditions of employment the keynotes of which should be *equity* and *uniformity* –

'fair treatment to the employee on the basis of his service to the Government, fair return to the Government for the salary paid to the employee, relative fairness to employees in different kinds of positions on the basis of the nature of the duties performed, regardless of departmental location, sex, or other consideration, and relative fairness to employees in the same kind of positions on the basis of their individual merits'.[2]

The basis of the system was classification; a special authority constantly to renew the classification; the relationship of salary-scales to the grades then set up; and a promotion system based upon Efficiency Ratings, i.e. more or less exact statistical expressions of efficiency. The theory of classification involved the detailed analysis and description of every job in the Government service—this was actually done for over 100,000 situations. This recorded and defined a position—a specific job or office.[3] To the description of duties is added a summary of qualifications required for their execution, and the lines of advancement.

[1] p. 44 ff. [2] p. 29. [3] Cf. *Report*, Part II.

All similar positions wherever they are in the Service constitute a *Class*. The next category inclusive of cognate 'Classes' is a *Series of Classes* or *Services* (or *Grades* as the Statute of 1923 designated them). These are grouped into the great *Groups*. The whole Civil Service fell, according to the Re-classification Commission, into three of these. Thus: There is a *class* of indexers in various departments; some grouped into the *Departmental Publications and Information Service*; this and other Services are *grouped* into (1) services involving clerical, office or commercial work; (2) skilled trades, manual labour, public safety or related work; (3) scientific, professional or subsidiary work.[1]

The essential importance of this method which differentiates it from evolution in other countries, is its conscious and minute attention to the *nature of the job*. Other considerations have been of some influence, even if not paramount, in Great Britain. Ever since the inception of open competitive examination, at which time, naturally, a distinction, if a rough one, had to be made between the different classes, English thought centred rather upon the educational system of the country and the natural stages, secondary and University, at which its products were completed and sent out into the world of industry and the professions. Of course, a rough classification by the nature of the jobs was made mentally: their characteristics were enumerated in a broad unanalytical fashion, and then the classes so formed were related to recruits from the various grades of schools. It is not necessary to do more than refer to the fact that the original Macaulay scheme, the Macdonnell Commission and the National

[1] This scheme was ultimately replaced by the present legal arrangement under the Classification Act of 1923, thus:

1. '*The Professional and Scientific Service* shall include all classes of positions, the duties of which are to perform routine, advisory, administrative, or research work which is based upon the established principles of a profession or a science, and which requires professional, scientific, or technical training equivalent to that represented by graduation from a college or university of recognized standing'.

2. '*The Subprofessional Service* shall include all classes of positions, the duties of which are to perform work which is incident, subordinate, or preparatory to the work required of employees holding positions in the professional and scientific service. . . .'

3. '*The Clerical, Administrative and Fiscal Service* shall include all classes of positions, the duties of which are to perform clerical, administrative, and accounting work, or any other work commonly associated with office, business or fiscal administration.'

4. '*The Custodial Service* shall include all classes of positions, the duties of which are to supervise or to perform manual work involved in the custody, maintenance, and protection of public buildings, premises, and equipment, the transportation of public officers, employees, or property, and the transmission of official papers.'

5. '*The Clerical-Mechanical Service* shall include all classes of positions which are not in a recognized trade or craft and which are located in the Government Printing Office, the Bureau of Engraving and Printing, the Mail Equipment Shop, the duties of which are to perform or to direct manual or machine operations requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations.'

Whitley Council Reconstruction Scheme of 1920 proceeded on this basis, and to the fact that the notion is still maintained.[1]

But the tendency everywhere is for the natural classification to become more intricate as the Services expand, and then the employees complain of the injustice of any particular classification, since the educational basis of classification puts them into categories of work so broad that within them there is room for great inequalities of work and reward. There is much to be said for the English system—taken as an extreme type—but inefficiency must be the inevitable result if it is taken to extremes. Its great advantage is that it does not influence the educational system to adapt itself to its detriment by deviation from the lines recommended by the nature of the educational process: and secondly, it reduces the scope of the 'crammer' for particular examinations. The American system classifies the jobs, and then expects the schools to provide the education to suit them. Its particular merit is to relate the nature of the specific job to the mind-training required for it, and to produce a closer relation of capacity service and reward than other systems.[2] Yet it also is anxious to secure some contact with the schools.

Efficiency Ratings. The Commission recommended the institution of a uniform system for rating efficiency and of correlating with this system rises and falls in salary, promotion, demotion and dismissal. The gist of its opinion was thus expressed:[3]

'It is convinced, however, that the measurement of individual efficiency is absolutely essential to insure just treatment of the employee and a fair return to the Government. Clearly the payment by the Government of a wage sufficiently high to enable it to procure efficient service in competition with the rest of the world cannot be justified unless it is assured that efficient service will actually be received.

'The Commission can see no way of securing such assurance except by the establishment of efficiency rating systems. These systems can be as varied in character as the needs of the different organizations and lines of work require. Obviously no single system can be devised that will be applicable to the entire service. Moreover, in the present formative stage of efficiency rating systems it is highly desirable that considerable latitude be allowed for experimentation with different systems even in the same or similar lines of work. At the same time, in order to secure uniformity and to give each organization the benefit of the experience of others, the general supervision of some central agency is

[1] Cf. also evidence of Mr. Meiklejohn, Civil Service Commissioner, Royal Commission C. S. (1929) Evidence, pp. 58 ff.; and W. J. Brown, Evidence, loc. cit. Cf. also *Report, Royal Commission, 1931*, p. 66.

[2] The French system is a rough classification only. The German system is to-day a pay-group system, which has proceeded upon a rational classification in the American manner. There are twelve pay-groups and sub-groups, e.g. the type for Group I is Ministerial Councillor (= English Assistant Secretary); for Group 4*b*, Supervisor; for 5*a*, Photographer, Lithographer; 8*b*, Woman Postal Assistant; 10, Machinist, or Works Assistant, etc.; 12, Stoker, Watchman. For a convenient exposition, see the *Beamten-Taschenbuch*, 1930, and subsequent years (Sudau, Berlin).

[3] p. 121.

necessary. Full authority to install efficiency rating systems and to provide for their application in such ways as it may deem wise should be given to the Civil Service Commission, which would naturally seek the fullest co-operation of the various departments in the prosecution of the work. The actual determinations of the rating of individual employees should be left to administrative officers in the organizations concerned, but all ratings should be forwarded to the Civil Service Commission and should be subject to its review and final approval.'

The Classification Act of 1923 set up the Personnel Classification Board to (1) classify and (2) review and revise the uniform system of efficiency ratings setting forth the degree of efficiency for (*a*) an increase in pay where the maximum is not yet attained, (*b*) continuance at the existing rate without increase or decrease, (*c*) decrease, (*d*) dismissal. Each employee was to be rated by the head of his department in accordance with this scheme of rating. 'The current ratings for each grade or class thereof shall be open to inspection by the representatives of the board and by the employees of the department under conditions to be determined by the board after consultation with the department heads.' The Personnel Classification Board is, appropriately, composed of the Director of the Bureau of the Budget, one representative of the Civil Service Commission, and the chief of the Bureau of Efficiency. Owing to various political manœuvres in the Senate of a particularly nauseating kind, with which we have nothing to do, the Board was crippled in its attempts to carry out the re-classification (the Bureau of Efficiency was to blame), and the construction of the Efficiency Rating Scheme was carried out in the Bureau of Efficiency.

Let us examine the scheme. (The reader should have Appendix I before him.) It is highly ingenious and very well illustrates the intense longing for a mathematical gauge of official capacity and the extent to which such an object can be produced.

The first document is a General Circular to Heads of Departments and independent Establishments.[1] It explains the system. A report upon each official is to be made every six months on a special Form called the Graphic Rating Scale.[2] A number of service elements are selected and appear upon this Scale—they ordinarily number fifteen, but a sixteenth is kept for Physical Ability needed in certain positions in the Custodial Service. For the clerical and administrative Staffs the number of elements—that is qualities—used in rating an employee varies from four to ten, being usually five or six, the exact number depending in all cases upon the nature of the duties performed. It is clear that every class in the Service needs for the exercise of its functions a different combination of these elements. Not only this, among these elements some are more important than others. Therefore, not only is a selection of the elements necessary, but also a

[1] Bureau of Efficiency, Efficiency Ratings, General Circular, No. 10.
[2] Appendix No. 1.

'weighting' of them, according to their importance, and this is expressed in percentages. Only experience can say what elements are necessary and determine their weights.

It may be asked, why stop at fifteen elements? The diversity of human occupation and services is more minutely divisible than these. The answer is that division has somewhere to stop, for without simplicity there is no understanding, and without understanding there is no control. Once more the need for comparison and control of a multitude of officials by a single mind (the Personnel Classification Board and Congress) dictates the situation. Further, the greater the sub-division, the more room for departmental choice of the elements, and again the difficulty of judging the relative merit in the aggregate of one official and another. *Yet this analysis of human qualities is necessary in the public service because the principle of free price-making and free profit-making has been discarded as the consumers' check upon the producers' aptitude, and any control is therefore bound to be on the ingredients which may compose efficiency.*

'It will be noted', says the Circular,[1] 'that certain service elements—some no doubt desirable for efficient performance—have been excluded from the list, to secure the greatest possible simplicity. Where variations from the element combinations shown in the table are contemplated, the principle of rating *only* service elements which are *plainly essential* to *satisfactory* performance should be *rigidly* adhered to.'

In those words which I have italicized, *only, plainly essential, satisfactory* performance, and *rigidly*, lies all the being and nature of the Services administered by the State. We cannot here reproduce in all their detail the service elements on the Graphic Rating Scale—they will be found in Appendix I. Here is the gist of each: (1) accuracy; (2) dependability; (3) neatness and orderliness of work; (4) speed with which work is accomplished; (5) industry, diligence, energy and application to duties; (6) knowledge of work; (7) judgement, common sense, wish to profit by experience; (8) success in winning confidence and respect through his personality; courtesy and tact, control of emotions, poise; (9) co-operativeness; readiness to give new ideas and methods a fair trial; obedience to the management; (10) initiative, resourcefulness, inventiveness; (11) execution (of work, not of people); (12) ability to organize, ability to delegate authority, to plan work; (13) leadership (ability to get co-operation of subordinates, decisiveness, self-control, tact, courage, fairness in dealing with others); (14) success in improving and developing employees by informing them, developing talent, arousing ambition; (15) quantity of work (to be used only when accurate and competent output records are kept). Thus the U.S.A. succeeded, by five points, in putting the

[1] p. 3.

English Report Form in the shade. It is an interesting analysis of psychological working qualities.

The Rating Officers are informed of the Service Elements for each Service, Grade and Class in a special Table of Notes.[1] Neatness and orderliness of work are unnecessary extras. A supervised Social Service Worker (Sub-Professional service) needs of

	Per cent.
Reliability	30
Neatness and Orderliness of work	8
Industry, diligence, etc.	22
Knowledge	14
Judgement	10
Confidence-winning	8
Co-operativeness.	8
	100

and, finally, a humble clerk, of the clerical administrative and Fiscal Service—Non-Supervisory—needs

	Per cent
Accuracy	40
Speed	30
Industry	20
Knowledge of his work	10
	100

Now to each element there is attached a scale, ranging from the greatest efficiency of that quality, 100 per cent., and going down to about 60 per cent. which is, however, counted as zero. It is a kind of clinical thermometer of the Civil Service, the calibrations of which have a value of 1 per cent. down to 80 per cent., then 2 per cent., and between the fourth and fifth position of 5 per cent. Above 100 degrees no servant is bad enough to stay in that class—he should leave it for another: below the official zero he should, as far as that class is concerned, expire, his unofficial shade being allowed, nay, pressed, to depart into the realm of private enterprise. Let us take two examples. A tax official needs Service Element No. 8 in a singular degree.[2] It is, 'Consider success in winning confidence and respect through

[1] Notes to the Table of Service Elements and Weights for Classes, Personnel Classification Board, Form No. 12.

[2] The circular says (p. 4): '"Personality" is provided principally for use in rating employees who are required to come into official contact with the public, but it is also used for minor supervisory positions when "leadership" is not an appreciable factor.'

his personality; courtesy and tact; control of emotions; poise'. The Rating Officer lets the mercury of his judgement run up and down the scale of efficiency: at 100 degrees it touches *Inspiring*, at 90, the official is only *unusually pleasing*; if the official is somewhere between, there is no designation; he is anything between 99 or 91 degrees. But he may be usually pleasing; and at 80 degrees he is only *Pleasing*. Sometimes the Rating Officer is forced to meditate upon the inequality of human conditions—after 80 degrees there is a tremendous drop of 15 to 65 degrees: *Weak*! and 'last thing of all that ends this strange official history' is—*Repellent*! at 55 degrees. Consider Service Element 13: Leadership. The scale shows: Most capable and forceful leader possible. Very capable and forceful leader; Capable leader; Fails to command confidence; Antagonizes subordinates.

Departmental Rating Officers mark the scale in those elements already combined by the Bureau of Efficiency or Personnel Classification Board. In pitching their mental mercury at a standard they are instructed to have in mind 'reasonable performance standards for the compensation grade in which that class is found'. When the rating is done, Reviewing Officers in the Departments compare the rating of different Rating Officers, and smooth out the results of abnormal variations of standard. These are then submitted to a Board of Review (a number of higher departmental officers). The Board discovers the percentage per element, multiplies it by the weight assigned to that particular element, and finds the weighted average by totalling the weighted element ratings, and pointing off two decimals. The Board of Review are informed in a series of 'Suggestions' how to control the ratings.[1] They are expected to prorate the ratings up or down in order that the final ratings should come to an average of from 80 per cent. to 84 per cent. for acceptable workers. The result is the final efficiency rating. A Report is drawn up in order of the efficiency ratings.

The eligibility of employees to receive specific salaries within the grade ranges, on the basis of their efficiency ratings, is as indicated in a special table. For example, in the Professional Service, Grade 3; Efficiency Ratings correlated with Salary Rates are:

Percentage	Dollars.
65–69	3,000
70–74	3,100
75–79	3,200
80–84	3,300
85–89	3,400
90–94	3,500
95–100	3,600

[1] Notes for Boards of Review, Bureau of Efficiency, 17 November 1924.

The attainment of the percentage is followed by a rise in salary rate within the grade; any fall in efficiency from this results in a fall in salary rate. As regards the incompetents, the rule is that an employee whose efficiency rating falls below 65 will not be continued longer in the work upon which he was engaged during the period covered by the rating. He should be assigned to duties more nearly commensurate with his ability, in an inferior classification grade, and his compensation should be fixed at a rate not in excess of that given for the 80 per cent.'s efficient of that grade. Should no suitable vacancy be available in an inferior classification grade he should be separated from the Service for inefficiency.

SURVEY

I have entered into some detail in discussing this scheme, not because it is possible to praise or blame its results—for as yet there is no reliable information obtainable as to them—but because the whole scheme is a fine illustration of the devices which the modern State is forced to accept if it wishes to secure as strict a control over the efficiency of its employees as any private employer does. It is a tremendous apparatus, and a very delicate one, to have to operate, but short of a high degree of native public-spirit, enterprise and freshness of mind in the Civil Servant, there is no logical escape from such a system of control, if efficiency is really desired. If every penny is counted, and if for each penny the maximum of return is to be obtained, some such scheme is indispensable. For, as we know, the general defect of a Civil Service is its sheltered position. It is sheltered from the risks of trade fluctuations, from the thousand and one environmental and human vagaries which make all the difference between business success and failure. Its pay and other conditions of employment are not subject directly to what it can make by its service to a consumer who has alternative sources of supply. Its contract is founded upon one of the surest and most unchangeable bases; the authority of the State, the need people have of the State, of Order, if not of specific services. And this foundation gives a sound title to taxation—the source of salaries.

Without, however, the possibility of movement, of fresh currents of desire, a standard of attainment and accountability, without risks and threats, fluctuations in reward and punishment, the average human being tends to fall into a state of unenterprising complacency, fitting his habits and mode of life to his predetermined pay and position. The most universal popular complaint about the Civil Service is the somatic condition at which even fresh entrants ultimately arrive, and the disease is caused by lack of incentive. The mind and body simply are not kept on the stretch, and they cease to be creative. It is a condition which is comfortable for the civil servants, and for the

order and regularity of the Service; in the slick performance of routine it is providential—not a single unexpected thing happens; but for Society it is apt to be a loss. Security of service and regularity of advancement are indispensable for some occupations in life, though the argument may be driven too far; but for the mass of men they cause enterprise to run down to the minimum point at which slackness, though existent, is undetectable. Both the English and the American schemes are designed to restore movement, hope, despair, acquisitiveness, and so stimulate effort. This problem will become more serious in proportion as the State proceeds to the further socialization of services; it is not unknown in the great monopolies of to-day. In proportion as the circle of private enterprise decreases, the opportunities of comparison of conditions inside with conditions outside the Service will decrease, and in proportion as laws are made, the activity of Civil Servants is at once dictated and confined. Further, the greater the number of services rendered by the State without a price, a direct *quid pro quo*, the fewer will be the bases for accurate rating of the produce of officials. The system we have just described is a perfect illustration of the extent to which judgements of the Civil Service are *linguistic* rather than numerical. Efficiency Rating Schemes will become more and more universal, and even as at the present time, Parliaments have come to demand that Estimates and Accounts be presented to them in a form enabling comparison to be made between units of expenditure in one Department and another, so must they, if they desire, in whatsoever form, to retain the control of the Executive, obtain an insight if not an actual control, over the Efficiency Rating machinery—the Boards of Review and the rest.

Whatever the actual outcome of the American experiment, it is at least a valiant and capable attempt at finding a solution. We may, according to the amount of cynicism in our character, smile a little grimly at their belief that human nature is so to be analysed, calibrated and recorded, and that this is a practicable way of controlling it. But stranger things than that already exist in human institutions—e.g. you cannot become a Civil Servant without an examination. And with a change of social forms and State activity stranger things yet will be generated.[1]

[1] Cf. Telford (Secretary, Civil Service Assembly of the United States and Canada), in *Journal of Public Administration*, July, 1930, 353 ff.: 'Nor in the United States are we ready to accept the dictum that, once "established", the civil servant must be kept and protected in the Service indefinitely; we know that our methods of selection and promotion are faulty, that the promising recruit frequently in practice proves to be a "dud", and that the State as an employer must protect itself from the mistakes it has made in recruiting by getting rid of the misfits, the incompetents, and the drones. We even go so far as to believe that the university-trained engineer, physician, or accountant probably can best serve his State, his profession, and himself by weaving in and out of the public service as he advances in his profession, working in positions in the public service, in large commercial organizations, or even as a

private practitioner as seems to him best at various stages in his career. We want also to avoid the attitude of many British civil servants that anything which has been done in a certain way for a long time is *ipso facto* sacrosanct, and in its place to cultivate the spirit of letting serviceability to the public, rather than tradition, determine methods and practices.

'Above all, in the United States and Canada, we look askance at the British custom of not relating pay closely to work. In our public service, we find that many of the young men and women who, on entrance, give great promise of brilliant performance in practice do not rise to their opportunities and cannot be given duties to perform which justify any except very modest rates of pay. In other cases, we have a plethora of brilliant material and find ourselves unable to assign to all of the able persons in the service duties and responsibilities which would justify high rates of pay; though capable of doing responsible work, they must confine their activities to the performance of more or less routine tasks because the number of higher positions is limited. In neither case are we willing to advance the maximum rates of pay beyond definitely fixed limits simply because these men and women have certain qualifications, because they are capable of doing better work, because they have served long and faithfully, or because of their real or alleged needs.'

CHAPTER XXXIV

DISCIPLINE; CIVIL SERVICE MENTALITY; AND CIVIC RIGHTS

LA FONCTION OBLIGE!

THE gratification of ambition, the acquisition of power, and increases of salary, are not the only incentives to good and better work. Often, indeed, these incentives cannot operate. Where a settled state of establishment has been reached, where all the prizes and the risks are foreknown, these tend to lose their virtue owing to their certainty, and States have found themselves compelled to introduce codes of discipline, more or less detailed, more or less severely enforced. The means to the enforcement of the conditions of work in private industry are well known and may be violent: the employer in person, or his representatives, the foreman, the sub-directors, the managers, are watchful for threats to the profit-making capacity of the firm, and the lame, the crippled, the incapable, the recalcitrant, may suffer many penalties up to the point of dismissal or enforced resignation. The non-competitive, sheltered nature of the public services blunts the edge of industrial discipline, for one cannot calculate quite so well how many pounds will be lost by certain specific behaviour. Further, the public services have a special dignity of a like kind to, but different in degree from, the great professions of medicine and law. They are, in its concrete forms, the State, and they may not behave as lesser associations are wont, in their every-day contact with their customers and their colleagues.

We are now concerned principally with limitations on the activity of Civil Servants designed to secure efficient work. In this matter Germany has the longest experience and is, indeed, the pioneer. Her rules are publicly known and constitute a large and definite chapter in constitutional jurisprudence. Many commentators have analysed and explained these rules, and the Disciplinary Courts have built a remarkable series of decisions upon them.

The main duties [1] of Civil Servants follow:

[1] I follow principally A. Brand, *Das Beamtenrecht*, 2nd Edition, Berlin, 1926; Schulze Simons, *Die Rechtsprechung des Reichsdisziplinarhofs*, 1926, Sect. 8; Hatschek, *Deutsches und Preussisches Staatsrecht*, 1921 and 1922; and H. Assman, *Die Dienstvergehen der deutschen Beamten*, Berlin, 1926.

(1) The Civil Servant is required conscientiously to discharge his office and all the duties directly appertaining thereto, in accordance with the Constitution and the laws, to obey the official orders of his superiors, in so far as they are not contradictory to the law, and to behave worthily of the respect accorded to his office.

The obligation of obedience to a superior does not extend to action and judgement while member of a board. On the contrary, the official is there expected to observe only the laws and statutory orders, and to make his decision and give his vote quite independently, according to his free judgement, and the dictates of his conscience. He must never allow himself to be moved from this free decision by the fact that his superior is a colleague on the board and differs from him in opinion.

It is not the business of an inferior to question the material value, the policy, of his superior's order He is sheltered from responsibility if the command passes four tests: it must be (*a*) within the local and material competence of the superior, (*b*) and of the subordinate, (*c*) not contrary to the laws and the Constitution, and (*d*) regular in form. When the official does not obey, it is at his own risk. He becomes liable to disciplinary penalties if his disobedience is declared unjustified by the higher authority or the disciplinary judge. Only an immaculate judgement on the part of the inferior will avoid a penalty. When the official is in doubt, therefore, he is counselled to obey, and then make a complaint afterwards.

(2) Civil Servants must carry out the duties of their office with the greatest sincerity and probity, without regard to private advantage; with the greatest impartiality, with all industriousness, and care. The official must be especially on his guard against partiality. Various decisions have made clear the meaning of this rule. For example, an official whose personal interest is likely to be materially affected in the exercise of his functions must withdraw from such an affair. No money may be accepted for benefits conferred by official activities. As to capacity to fulfil his duties, sheer ignorance, physical inability, or mental aberration would not lead to disciplinary action, but to direct and unchallengeable exclusion from the Service. But the law acts with a disciplinary intention where such incapacity is or may be brought on by the official's voluntary behaviour, for example, by dissipation, drunkenness, or waste of time such as that of him 'who without permission from his superiors seeks out a colleague during service hours and talks over a private matter for an undue length of time (*längere Zeit*)'.[1] Beyond this there are many special rules, specially appropriate to different classes of work. For example, extraordinary weight is laid upon the impartiality and incorruptibility of the officials (Schulze-Simons, No. 45), and upon the absolute in-

[1] Brand, op. cit., p. 424 and footnote.

violability of secrecy of posts, telegraphs, and cables. We find similar special rules in the Civil Services of other countries also.[1]

(3) Civil Servants must keep punctually to the hours of arrival at and leaving their work. These hours are fixed by the Ministry of the Interior, and special variations are made by the different Departments for special reasons. But an attempt is made to maintain uniformity in the same type of services all through the Reich, State, and Local Authorities. The Departmental chiefs can make arrangements about the 'free afternoon'.

(4) Without the official's having a legal claim to extra pay, an extension or alteration of existing functions may take place, so long as the new work corresponds to the training and capacity of the official, and is not of an entirely different nature, and is derogatory neither to the normal activity of the official nor the honour of his rank. (Officials delicate in health must be treated with special care.) When special help is demanded during a strike to make up what the strikers would normally have done, all officials are obliged to obey—even higher officials are obliged, where necessary, to do purely physical labour.

(5) Civil Servants are obliged to be truthful in official dealings, even when they are under a charge, and they must not pass over in silence important facts the disclosure of which is of concern to the Department. This obligation of candour and truthfulness extends to information which is demanded about extra-official behaviour.

(6) Respect for superiors is demanded, outside as well as inside the office, even when the superior is objectionable in character and demeanour. The forms of this respect have been construed in terms of superlative subtlety. You may not omit the usual daily greeting, but women cannot be expected to greet their superiors first[2]; when your superior enters the room you must rise; and then, towards all officials, inside and outside the office, a respectful attitude must be observed, especially to any of a higher grade! The president of a Staff Council must preserve this respectful attitude even during the course of his presidential duties! There has twice arisen before the Reich Disciplinary Court,[3] the case of a superior officer in an altercation with a drunken inferior, when the Court wisely ordained that the

[1] Cf. British Revenue Officials (Administration Volume of the Instructions Books): 'Having regard to the technical and frequently contentious nature of the work, it is not always easy to satisfy taxpayers as to their obligations and rights under the Income Tax Acts, and it frequently happens that a taxpayer feels a sense of grievance for which there may be no grounds apparent to a member of the staff. In such cases, patient attention and a courteous explanation of the point at issue will do much to remove any sense of grievance and expedite the settlement of a case,' etc., etc.

[2] A Civil Servant has answered this difficult question thus: 'A woman Civil Servant nods first to a man when he is a superior officer, very old, or has otherwise a generally higher social standing.'

[3] Schulze-Simons, 22.6.22 and 18.6.24.

superior officer is bound to break off the conversation and retire as soon as the altercation threatens to become heated; and, should he not act in this way, the superior is held responsible for the ensuing behaviour or insult. An inferior officer has a right to charge the superior with insulting him, but in the course of such a charge he must maintain the regular etiquette; and a superior officer is obliged unequivocally to withdraw any unfounded charge against an inferior.

(7) 'In their intercourse with the public, officials must always be courteous. They must avoid roughness and apathy; they must be friendly and obliging; must try to further the affairs of all who appeal to them, and readily give advice and information to persons who are ignorant of the law and official routine, providing that official duties or the legitimate interests of others are not opposed thereto. Quiet and circumspection must be observed, for procedure may easily awaken an impression of violence and prejudice and make difficult the execution of business. The mode of dealing with the public also depends in a certain measure upon the educational level and the breeding of the individual, and the right way here will be indicated by the natural tactfulness of the official. Officials must be helpful to each other.' [1]

(8) Officials must not allow insults to pass unnoticed, lest the Service should suffer degradation.[2] By the Criminal Code (Clause 196) an action lies against persons who insult an official (*Beamtenbeleidigung*). In cases where the official is in doubt about the significance of the insult, he may consult his superior, who may take an action for insult if this occurred during the exercise, or otherwise in respect, of the official's duties. Indeed, to maintain the dignity of the State (as authority) the superior may not consider whether the official was personally hurt or not, and whether or not he desires an action to be taken. It is the office, Authority, which is of paramount importance. That this is so is proved by the opinion (which is, however, a subject of dispute) that the Department has a right to forbid an official from taking action if the publicity of court proceedings would prejudice the interests of the Service. In such cases, it is held by jurists of good repute, the personal claim of an official to satisfaction must give way to the interest of the Department.

(9) A long series of laws, Orders, and Departmental Minutes, enjoin such behaviour in non-official life that the dignity, confidence, and respect bound up with the office shall not be disadvantageously affected.[3] The Frederickian Code, the *Allgemeines Landrecht*, already forbade irregular life, gambling and the contracting of debts, and condemned officials who made themselves despicable by base behaviour. Officials connected with any financial departments are forbidden to speculate, and this as well as drunkenness and frivolous contracting of

[1] Translated almost verbatim from Brand, pp 427, 428.

[2] Schulze-Simons, p. 231; 22.12.13.

[3] Cf. for France the doctrine (Jèze, II, 91) of *dignité de la vie privée*. Its derogation is a Service fault subject to official discipline.

debts may result in dismissal. Nor may an official deliberately endanger his health or protract his convalescence by foolish behaviour. In short,

'every official must in his extra-official life have regard to the special obligations which his official position imposes upon him. The official must therefore so order his general way of life to conform to prevalent opinions on virtue, manners, and morals. This duty he owes, not only to his master, the State, to which he stands in a special relationship of loyalty, but to the whole of officialdom, which ought to suffer in its ranks only worthy professional colleagues.'[1]

The jurisprudence on this subject—the general moral behaviour of officials in their private lives—is voluminous. For example, careful distinctions, which we need not investigate too closely here, are made in the matter of sexual relations, in order to separate Self-regarding from Service-regarding behaviour. Some behaviour is immoral, but not subject to disciplinary action, or there may be immediately immoral behaviour with an ultimately moral purpose. As soon as such behaviour becomes publicly known [2] and can redound to the discredit of the Service, a breach of discipline has been committed.[3] This discipline is especially strict (quite naturally) in relation to school teachers, and marriages must be notified as soon as they take place, including the name and profession of the father-in-law.[4] Again, drunkenness, occasional and chronic, is classed according to its effect upon the official, his co-operativeness, his dignity, and the degree of responsibility and sobriety strictly required for his work. Police officials have especially severe obligations of sobriety. In the matter of contracting debts, not only is the official himself watched, reprimanded, and fined when the matter becomes serious and damaging enough, but he is expected to stop his wife from frivolous domestic economy! Games of chance may be played, in good company, so long as one's economic independence is not thereby jeopardized!

(10) No official may take on any additional offices or employments, other than those for which he has asked and obtained permission of the appropriate Departmental authority.[5] It is an axiom of the Service that *all* the official's time and energy must be devoted to the proper fulfilment of official duties. (The right to take part in political activity is a special case to which we later devote special attention.) Paid membership of boards of directors or management of a limited

[1] Brand, p. 429.

[2] The Prussian Supreme Administrative Court, in 1912, would not punish an official for visiting a café where waitresses serve, since no obligation not to do so existed —but there was an obligation not to go beyond the bounds of decency in an acquaintanceship with a waitress in such a public place. (Assman, p. 68.)

[3] Schulze-Simons, pp. 252, 253, and 256, gives various cases.

[4] The severity of the rules was originally most marked in the financial departments—at one time previous permission to marry had to be asked for and granted. The existing situation is regulated by the Order of the Finance Ministry, 25.1.22.

[5] Cf. Brand, Part VIII, Sects. 147–52.

liability company, co-operative society, or any other profit-making corporation is entirely forbidden to whole-time officials, but mutual provident societies do not fall under this ban. Other types of subsidiary employment, like agencies for insurance companies, trusteeships, accountancy, editorship of periodicals, coaching, the carrying on of a craft or trade, require no permission. No such permission is given for the management of a public-house or an open stall. The wife, children, and servants of an official are given permission to carry on only those trades which are not likely to result in the degradation of official dignity. Nor is the official now given permission for continuous and regularly paid professional orchestral and concert performances.

(11) The Civil Servant must observe official secrecy.

These duties form a comprehensive code of behaviour which the Civil Servant is obliged to respect. Penalties of various grades up to the point of dismissal are attached to them, and their intention is to maintain the efficiency of the Service. No State is without them, although there are differences of content and form. The tremendous difference between Germany and other countries is this: that while she has a code stated quite publicly in a convenient form, Great Britain has only an incomplete set of Treasury Circulars and Minutes and Departmental Rules, without coherence and uninformed by a deliberately applied mind,[1] the U.S.A. departmental rules and a few clauses in certain statutes,[2] and France has only a number of principles flowing from the general axiom that the Service must serve the State, and these principles are enunciated occasionally by the *Conseil d'État*.[3] Secondly, whereas the Continent has a regular set of law courts (administrative tribunals for the most part) which are competent in this matter, England relies upon the ordinary sense of justice of the Departmental chiefs (which may or may not be a valuable safeguard), and in the final resort upon the Minister and the Treasury, in serious cases, and extraordinary tribunals when a particularly striking scandal occurs, as in the Gregory case, and the U.S.A. upon the head of the department.[4] In a later section Continental procedure, with its regular safeguards for official and State, is discussed.

These rules are ubiquitous and ever-present threats, and the essence of their purpose is subordination and devotion. They are, in fact, of the nature of a State religion: they are those commandments which issue from the nature of the State, and are based upon the desire to maintain the State. An analysis of the nature of any one of these obligations ultimately ends in revealing some aspect of the general nature of the State—whether it be Authority, or Order, or

[1] Cf. Royal Commission C. S. (1929), Introductory Memoranda (63 49), p. iv ff.
[2] Cf. Annual Reports, Civil Service Commission, Directory and Prohibitory Statutes, and Rules.
[3] Cf. Jèze, op. cit., Vol. II, Chap. 2.
[4] As regards dismissal cf Mayer, op. cit., p. 492 ff.

Service, or Impartiality among the various social contestants for power. Given the nature of the State one can, on the contrary, work back to these rules; they are the inevitable expression thereof; and who wills the one wills the other. Some may be practised a little too roughly, some too mildly; some may be antiquated and deserve abolition, and again there are others which ought to be included but are not. But in their substance they are calculated to create a mentality and supply incentives so that the public services may operate effectively in spite of the fact that the rather violent discipline—the economic fears and aspirations of the competitive and profit-making world is absent. They are in part a substitute for the rough justice of the manager, the foreman, and the customer's dissatisfaction with services and commodities produced by the private employee. But, of course, the great monopolistic businesses of the modern world, especially where their market is inelastic, are obliged to adopt similar methods to secure steady creativeness, and, in fact, they do so.

The Civil Servant is obliged to eschew certain satisfactions for the benefit of the Service. For example, in the Gregory case, the Board of Inquiry said:

> 'A Civil Servant is not to subordinate his duty to his private interests; but neither is he to put himself in a position where his duty and his interests conflict. He is not to make use of his official position to further those interests; but neither is he so to order his private affairs as to allow the suspicion to arise that a trust has been abused or a confidence betrayed. These obligations are, we do not doubt, universally recognized throughout the whole of the Service; if it were otherwise, its public credit would be diminished and its usefulness to the State impaired.' [1]

The general rule necessarily holds good in every case where a special art or craft is pursued. Discipline is severe in proportion to the excellence of attainment sincerely desired. Bernard Shaw does not drink tea, coffee, or alcoholic liquors, mainly because he is loyal to his craft: has he not said that without them he kills nine out of ten thoughts, but having consumed them he loses the power of self-criticism! The most splendid code of systematic self-discipline is the Book of Spiritual Exercises made by Ignatius Loyola for the Jesuit Order. The novice passes twenty-eight days in devotional retirement. In this seclusion he is humiliated by the memory of his past life and troubled with a vision of future labours and sacrifices. He then learns the life and works of Christ, and chooses the specific path upon which he thinks to tread towards the divinely appointed goal. He is helped to enter into the spirit of the way of salvation made known by the Saviour; and before the resplendent light of this

[1] Report of the Board of Inquiry . . . to investigate certain statements affecting Civil Servants, Cmd. 3037, 1928; p. 21. It is interesting to observe, throughout the whole of that Report, the constant insistence that without the proper rules and the appropriate ethic the Service would lose public confidence.

revelation the novice annihilates his average nature and surrenders for ever to the commands and prohibitions adequate to the duties which he has now come to expect of himself. Each day starts with prayer, and then a *prelude*, that is, a strenuous imaginative evocation of men and places, or his personal vices, which he will be called upon to master during the day. He must obey the dictates of his preconception. Then (and on each day there is a different routine) he traverses a number of spiritual stations; surveys his sins and meditates upon their despicable baseness; reflects upon the distance of his fall from the possible maximum of human saintliness; and from the high morality of God, meditates upon, and even cries aloud, his worthlessness compared with the Lord's unbounded loving-kindness; vows that he will embrace the means of amendment, and repeats the Lord's Prayer. A ritual of penitence, all military in its qualities of discipline and subordination to the command of the former cavalry officer, Loyola, was prescribed, and it recalled in terms calculated to rouse the martial spirit, the eternal battle between Wrong and Right.

More modern and ordinary instances abound. A good runner is made by careful diet, proper spells of rest, and disciplined exercise. A competent boxer suffers terribly during training; similarly with dancers, painters, and writers. They discipline their talents.

The ordinary, average worker is kept to this intensity of training, this carefulness of life, is kept 'in form', by the prospects of advancement, or of losing his job, and many other things which operate equally in the Civil Service, as, for example, the opinion of his friends and the sneers of his enemies, a pure sense of self-respect, and so on.[1] The security of tenure, the colleagueship, the monopoly of unpriced services, reduce the strain and tautness and severity of the service of the State, and a deliberately invented and consciously inspired code of discipline is the necessary basis of progress. The desire for excellence of attainment must be, if it is not spontaneous, at least synthetically fabricated. Whereas in private employment the price of service in large part evokes obligations and restraints, in public employment the obligations and restraints which serve the public are not in strict proportion to the price paid to Civil Servants.

In some countries a note of religious solemnity is introduced into the whole arrangement by the institution of an oath which Civil Servants take when entering the Service. In bygone days such oaths were personal, that is, they were made to the Prince, King, or Emperor,[2]

[1] Cf. *Professional and Business Ethics*, by Carl F. Taeusch, New York, 1926.

[2] E.g. the oath in the fifteenth century (in Prussia) was to the immediate master; to him was sworn faithful service, the care of his interests and those of the country, the prompt and careful execution of all official duties as well as the special orders of their master, finally the strict keeping of official secrets and other confidential information made by their master. (Isaacsohn, *Geschichte des preussischen Beamtentums*, I, 7.)

and it was to the personal service of these that the olden-day Chancellor, Marshal, and other officers swore devotion. The transformation of the royal State into the impersonal State has resulted in the oath being taken to the laws and the Constitution. For these continue, or lawyers are prepared to demonstrate that they continue, though Presidents, Prime Ministers, and party leaders come and go. German officials 'swear loyalty to the Reich Constitution, obedience to the laws and conscientious fulfilment of my official duties'[1]; and those who are in the employ of a State, take the same oath and an extra one imposed by their State; in Prussia, for example, the official swears that he will administer his office impartially and according to his best knowledge and capacity, and that he will conscientiously observe the Constitution.[2]

The Obligations of Public Service. Supposing now that the present tendency towards maintaining State activity continues, that the State socializes, that is, manages, a large part of the total economic activities to the exclusion of the present price- and profit-making machinery, and discards for the great basic necessaries the principle of price for the principle of the best quality and greatest quantity to him who needs most; or even the principle of equal distribution? If the ordinary economic motives as they now operate are devitalized by the State provision of secure economic conditions, what principle of behaviour must be put in their place to serve such a philanthropic State? If nationalized services are to operate with the maximum of beneficial effect and the minimum waste of energy and resources, it is not enough that they are manned by Civil Servants who know how to go about their business, acting in an ingeniously-planned organization. A faith must animate them and sustain them in the use of that knowledge, a faith akin in its steadfastness and compelling attraction to that which moves great scientific, intellectual and artistic natures. They must believe that their work and their surrender of easy satisfactions and daily indulgences are worth while. A dynamic ethic is necessary, an insistent commandment, an unfailing 'Thou Shalt' and 'Thou Shalt Not'. This ethic can have an enduring effect only if it is based on a deliberately inculcated scheme of beliefs about the debt owed by individual men and women to the society whose service is their purpose, and these beliefs

[1] Cf. Constitution, 1919, Art. 176.

[2] France: Under Napoleon as Emperor Civil Servants swore obedience to the Constitution and to the Emperor, this form remained until September, 1870, when the oath of service was suppressed. But Jèze says that the professional oath still exists. He condemns it, saying it is puerile, because a magistrate or a teacher will serve loyally in any case. 'In fact it is a practical and theatrical means of fulfilling the official ceremony of installing a public officer. It has no legal significance. The oath adds absolutely nothing to the service duties of the official' (op. cit., II, 94).

U.S.A.: No oath.

Great Britain: No oath.

must be held with religious intensity. We have glanced at the present state of those beliefs as included in the codes of discipline of some great modern States. But they merely correspond to a degree of socialization which if it is not small is at least not yet large compared with the schemes of all modern progressive political parties. And even Conservative Parties are socializers in the many things they would like to *force* everybody else to do: for Conservatism is not and never has been by any means individualistic. It merely asks of the State different activity from that demanded by others; but, emphatically, it asks the State's intervention. If society, then, comes to rely upon the socialized operation of essential industries its success will depend entirely upon the quality of mind the Civil Servant brings to their conduct. And it seems to me that that quality of mind must fulfil the following conditions:

The Civil Servant must believe that the public welfare is his sole end, and that he is not entitled to spiritual and material adventures which conflict with this end. He must subdue desires for alternative satisfactions which are incompatible with the public welfare. When all constitutional channels, in the creation of which he will naturally have had a fair say, have been used in regard to his claims for pay, conditions of work, amount of leisure, etc., he must accept the result without that malice, sense of injustice or revolt which would spoil his work. Since only what best serves the State is best, it is a breach of official faith to show favouritism or jealousy in the course of his official duties on grounds of race, creed, class, sex, family-ties, etc. If he receives orders which are unsound, or is reprimanded, as he thinks, unjustly, his sense of obedience must not be weakened, and (without animus) he must honestly state what seems to him unfair and inefficient. The use of his leisure would need to be such as not to unfit him for the best performance of his duties. His inventive faculties must be continually kept at their fullest natural stretch. His imagination must, as far as it can, see through the forms and the oral and written reports to the human realities they represent. The representative assembly and its organs will lay down the limits within which he may act officially, and he owes obedience. Tolerant and kindly to those below him in rank and to the public he serves, he must use his official authority no more than the interests of the Service require, and suppress the impulse of personal dominion since his command is held only as a trust for society.

These are austere conditions, and the task of cultivating them in one or two million administrators drawn from the average men and women we know is fraught with immense difficulty. Indeed, it may be asked, is the task even possible? We shall not attempt to answer that question here, but we may indicate some of the elements into which the inquiry must be resolved. How far is the incentive to make

private profit actually operative in modern industry? How strong are other motives, if present, compared with it? Was private profit the predominant motive when the young men or women first entered employment, or were they attracted by other prospects in their vocation? Would a freer choice of profession modify the desire for harsh competitive economic advantage, and fortify the strength of other mental and spiritual factors, such as delight in speculation, research, organization, handicraft, and so forth, essential to sound progressive industry? How far, in fact, has predaceousness been checked, in professions and business; if it has been limited by an accepted body of ethics, what general effect has this had upon the behaviour of those accepting it? Has there been, for example, much private rebellion against the code—did men 'grunt and sweat under a weary life', and feel that they bore fardels? For we must beware that we do not remove the human stress and pain from where they are resident in society to another place; and good statecraft is to move and redistribute them so as to reduce their incidence to the minimum possible. And it is all too easy to make mistakes: to create sheer ugliness and moral inhibitions without creating as much or more freedom, beauty, and moral development. Of this the statesman must beware, and the cost must be anticipated. And, finally, we must ask whether we can possibly devise a system of education for children and adults which will enable us to inculcate the code of discipline—how far can we go along this road of changing the schools, the universities, and the environment, and thereby of subjecting impulses and restraints to our rationally conceived social plans? For the ethics of every profession will be found, on close analysis, to be not much higher and not much lower than the general decency of the nation as a whole. Their nature, at the least, is powerfully moulded by the level of the surrounding and pervading civilization.

These are not easy questions to answer. They require an exact and critical research into human nature and the world in which it lives. But whether they are answered before we move into a more socialized or a less State-controlled life than we have now, the good we decide upon will be purchased by a price paid in the currency of such restraints as we have observed in the official discipline of to-day.

POLITICAL RIGHTS

The democratic principle has had at least as much influence upon the modern State as the principle of efficiency, and the public services have been powerfully affected by it. But the notion of authority still lies strongly embedded in the organization of the modern Civil Service, and though the democratic principle has had its influence, its effect is still only in the early stages of evolution. All kinds of motives combine to support the harshness and firmness of the State's authority over

its servants, and these motives are grounded in the State's prestige and in its social importance. They constantly put up a strong resistance and decades have been required to bring some mildness into the State's relations with its servants, and the concessions have never been made but with great misgivings by their donors. Parliaments are in fact dreadfully frightened by Civil Services: they and society seem to be lost without them and lost with them, and they feel compelled to treat them in a way which has, in the last generation, at least, not been tolerated by the private employee. We have already in our discussions of Discipline traversed some of the reasons for this. The motives for the maintenance of authority in the Civil Service and the arguments which have in part prevailed against them, will become clear in their detail as we discuss the various elements of political and economic freedom and the theory and practice relating to them.

Political freedom falls broadly into two parts—that which concerns the exercise of the Vote and general political activity, and that which concerns candidature for Parliamentary and Local Government assemblies.

Here we have space only to discuss the first.

The Vote and Political Activity. No countries now forbid Civil Servants from voting, nor, as a special class, were they so limited in the nineteenth century. The tendency has been rather for Civil Servants to be especially welcomed as voters, not by the law, but in political practice, because the Government in power (in France until 1871 and in Germany until 1918, the Crown's Ministers in a mock-constitutional State), and the parties struggling for power, have always hoped to influence Civil Servants and candidates for the Civil Service to vote for them. Governments have always had a fairly easy task, especially in France, Germany, and the U.S.A., in coercing Civil Servants, and espionage on the actions of Civil Servants has served to reveal any injurious recalcitrancy. The story of elections in France, Germany, and the U.S.A., and in a lesser measure in England, has been one in which officials have been well primed before elections and subjected afterwards to inquisition and victimization.[1] The importance of these votes in the aggregate can be gauged when we remember that the officials (local and central) of France constitute one-fifteenth of the entire body of electors, and nearly as many in Germany, and lesser but substantial proportions in other countries. We may take it, too, that there are fewer abstentions among Civil Servants than other branches of the population, partly because of the nature of their profession, partly because of the directness of the pressure brought

[1] Harmignie, *L'État et ses agents*; Lefas, *L'État et les fonctionnaires*; Pilenco, *Les Mœurs du suffrage universel*; Weill, *Les Élections Législatives*; Lotz, *Geschichte des deutschen Beamtentums*; Fribolm, *Die Frage der deutschen Beamten*. For Bismarck's theory of officials in a constitutional monarchy, see Roell and Epstein, *Bismarck's Staatsrecht*.

to bear upon them. Further, they have, in bureaucratic countries, made very good canvassers. These qualities persist in France even to-day, though they are modified by developments of which we will speak in a moment; in Germany they were cynically employed until 1918, when a great break was made with the electoral and bureaucratic past. In England the progressive disappearance of patronage and the growth of bribery and corrupt practices legislation reduced the significance of this use of the Civil Service vote to a negligible proportion after 1870. In the U.S.A. the remnants of the spoils system still leave Congressman and the Senator an ample field for ugly election practices.[1]

At first, and to some extent even now, the Civil Service vote was encouraged by the politicians for their own purposes. But as the numbers of the Civil Service grew, and its members became ever more aware of their collective economic interests, they became strong enough to threaten to make at least a few members of Parliament the servants of their special interests. The threat from some bodies of Civil Servants, like dockyard workers and postal officials, was strong enough to constitute a problem. The way out of this difficulty was variously proposed as disfranchisement or the creation of special constituencies.

But no great harm has come from leaving matters to take their own course. It is too grave a penalty to debar a Civil Servant from voting when the result of that voting has, on the whole, so little effect. If Civil Servants were much more numerous than they are, and if their activities and power were not offset by other voters and associations, then some other arrangements would need to be made. In a State in which, for example, the Civil Service included over one-half the working population, and where all trades were organized in associations, it is possible that, at the minimum, a strong element of vocational representation would be incorporated in the Constitution. But the vote has obviously come to stay.

Political Activity. The extreme of liberty allowed in political activity is to be found in France. But this is not based upon any consciously elaborated political theory: it is simply the chaotic result of the Declaration of the Rights of Man. In so far as there is any regulation of political activity at all, it comes about administratively, and is derived from the authority of the Minister and the heads of the Department to see that the officials do their work properly. Where, therefore, participation at meetings, the employment of time in writing, and canvassing, acting as treasurer, and so on, affect departmental activity, the means of its restriction is part of the ordinary disciplinary arrangements. But the tendency in France has been not

[1] Merriam, *The American Party System*; Brooks, *Political Parties and Problems*; Sait, *American Elections and Parties*; Foulkes, *Fighting the Spoilsmen*.

to forbid or even narrowly restrict political activity. It has been simply to turn it into 'proper' channels, that is to say, to make it support the Government of the day, and rid it of anti-patriotic, anti-militaristic, syndicalistic elements, and religious suspects.[1]

'The same men,' it has been said, 'who to purify the law of all Catholicism, asserted the indifference of the State to all doctrines, to-day recognize the State's right to have a doctrine; those who negated the soul say that it has the "charge of souls", those who forbade it to challenge the independence of the mind by any philosophical preference, assign to it the duty of creating "the unity of minds".'[2]

A few years ago spies were sent to the meetings of the disloyal in order that the Government may 'know what is the attitude of the officials respecting the Government of the Republic they must serve'.[3] Some were dismissed, others retarded in their advancement for their views. The personal records were the unfailing registers of political behaviour. France has not yet fully learned the public value of a Civil Service left free of political influence, and the reign of cynical interference, though lessened, continues, and it is entirely arbitrary. There is no parliamentary respect for the 'public thing'. This, in spite of the fact that the jurisprudence of the *Conseil d'État* does not permit use of the disciplinary or promotional power on *political* grounds.

In England manners and institutions are much different. There is a comparatively high standard of public honour, there is more subordination to the public welfare. Long years of electoral experience and efficient party organization have made Civil Servant canvassers unnecessary, while the tradition of the impartiality of the Civil Service is a generally respected convention. Rational consideration has therefore been given to the subject, and a series of rules worked out by the various departments and the Treasury. Generally these allow political activity so long as it is not of a sort to bring the Civil Servant as an official into such conflict with the other citizens that the public service would suffer damage in its dignity, authority, and reputation as an impartial servant of the community. The rules, therefore, affect the combativeness of the Civil Servant, and his occupation with politics while in official uniform or during his official hours. The Order in Council, of 1910, embodied the traditional custom of the service that 'employees of the Civil Service should take no overt part in public political affairs'.[4] Examples of departmental rules are the *Clerk's Instructions* of the Board of Inland Revenue which forbid any officer

[1] Cf. Harmignie, op. cit., pp. 29 ff.; and Leroy-Beaulieu, *L'État Moderne et ses fonctions*, p. 81.

[2] Ét. Lamy, *Catholiques et Socialistes*, p. 38, cit. Harmignie, op. cit., p. 30, footnote.

[3] M. Dubief, Minister of Commerce, *Journal Officiel*, 7 February 1905, p. 195.

[4] Clause 16.

to become secretary of a political association or club, and the Post Office rule forbidding canvassing or other political demonstration while in postal uniform, or serving upon a party committee concerned with furthering or preventing the return of a particular candidate.

In 1925 a Treasury Committee was set up to consider the existing regulations governing the candidature for Parliament and for municipal bodies of persons in the service of the Crown, and its report [1] dealt with political activity and the right of candidature, but with special and almost exclusive attention to the latter. However, the Committee was well aware of the importance of restrictions and required their maintenance wherever the reputation for impartiality of the Civil Servant might be jeopardized. The main ground for such restrictions upon candidatures and political activity was this:

'The constantly extending disposition of Parliament to entrust the exercise of quasi-judicial duties to executive departments without providing any of the established safeguards operative against judicial excess—such as publicity, right of audience to persons affected, statement of reasons for judgement, right of appeal, and the like—as well as the sharper alignment of political parties in these days, unite to make the high reputation for political impartiality hitherto enjoyed by the public service a more valuable national possession than ever before. We can feel no doubt that the confidence universally held in the existence of such impartiality is a most valuable guarantee for its continuance, and we can have no assurance that the existing ethic of the service would long survive that confidence if it were once lost.'

Germany has not for long had anxieties on the score of this problem, since, before the advent of democratic government in 1918, the Government mastered the political activity of its servants and saw to it that none save 'friends of the Government' or 'Fatherland-faithful' citizens became and remained Civil Servants. The large military element which had the monopoly of the lower clerical and custodial grades was well enough disciplined not to need encouragement to occupy itself with political activity excepting as it pleased the Government, that is, the Conservatives; and the upper Civil Service was in the main by birth and social position the supporter of the Government, and those who were heads of the local authorities were the political agents of the Government.[2] A long and bitter controversy raged round the position of the heads of the local hierarchy under the name of 'the problem of the political officials'.

Nor is it yet settled, for the advent of democracy has aggravated the problem. It was especially among the Civil Servants of executive and clerical rank—always the storm-centre of agitation in the Civil Service—that resentment was felt about political limitations.

The change from monarchy to democracy has thrown Germany without any preparation into the very midst of all the bristling diffi-

[1] Cmd. 2408, 1925.

[2] See von Gerlach, *Meine Erlebnisse*; Wermuth, *Ein Beamtenleben*.

culties of the problem. The first impulse, as soon as parties became all-powerful, was for each party to use the Civil Service for all it was worth as 'spoils', and as votes, canvassers, and election agents, and some things—some necessary—were done in the early months of the Revolution.[1] Then the constitutional assemblies of the Federation and the States set to work and produced the elements of a code. The main features in the Reich and in Prussia emerge from a consideration of Article 130 of the Constitution of 11 August 1919, and a series of decisions given in the Supreme Administrative Court of Prussia. The constitutional clause says:

'Officials are servants of the community, not of a party.

'All officials are guaranteed freedom of their political opinion and the right of association.

'Officials are accorded special representative committees which will be constituted in detail by a law of the Reich.'

We are here principally concerned with the second clause of this Article—on the freedom of political opinion. This, when taken together with Article 118, which gives all citizens the right to express their opinions freely, but within the limits of the general law,[2] means that the official is without any constitutional limits upon his political activity. But these constitutional rights are abrogated to the extent made necessary by the nature of their office.[3] This is a very good illustration of the argument sustained in the previous section on Disciplinary Codes and the need for an official ethic. The constitutional rights of Civil Servants are limited by more than the general criminal law; they are not like ordinary people. These limits do not go so far as to exclude officials from the franchise, or to require that they shall change their political party because it happens to have a point of view different from the Government of the day. But officials must be held in check by remembering that their behaviour may affect the belief in the impartiality of their official function. No admixture of official and political activity is permissible. Nor may any official superior use his authority to influence the political opinion and activity of those under his control. Officials are forbidden[4] to use their official or social power to influence votes, and all political agitation

[1] von Gerlach, op. cit.

[2] I.e. the criminal law relating to libel and slander, etc.

[3] Cf. Brand, op. cit., p. 486; Anschutz, *Die Verfassung von 11th August* 1919; the Prussian *Oberverwaltungsgericht* (1927) laid down very strong doctrine: 'The right to freedom of opinion is no unlimited one, but finds its limits for every citizen in the general laws, and for the official further in the duties imposed on him by his duties, principally in the duty of obedience and loyalty which forbids him from making a use of this right as unlimited as other citizens who are not under the compulsion of the unrelaxable official discipline in the general public interest. The office includes the whole of the official's personality. He is never a mere private citizen. in all his actions, even outside his office in the narrowest sense of the word, he must know and remember that his office binds him.

[4] Ministry of Justice, 15.1.19; *Justizministerialblatt*, p. 18.

in official precincts is strictly forbidden. The Supreme Administrative Court of Prussia has decided that the 'freedom of political opinion' means that any official may openly proclaim himself the member of a political party, and that against this simple declaration no disciplinary action can be taken.[1] Cases have, however, arisen where officials wore party symbols, like swastikas and Soviet stars, buttons, and badges, and since experience showed that these had resulted in undesirable altercations and a disturbance of the peaceful continuity of official work, the exhibition of symbols during service has been completely forbidden [2]

The penal code [3] forbids all officials, without exception, to promote or support, by positive activity, the efforts of political parties who wish to abolish the bases of the existing republican forms of the State by violence—as, for example, the Communist Party or the Separatists. An official, for example, who has participated in the formation of a 'red army' must be dismissed.[4] Behaviour of this kind is naturally against the oath of office. The law on the Defence of the Republic [5] which has been inserted into the Reich law relating to federal officials also imposes special duties upon them. They must not in public and during their functions promote movements to bring about the restoration of the monarchy or against the existence of the republic, by the misuse of their official status or by incitement or spiteful behaviour, nor support such movements by calumniating, defaming, or bringing into contempt the Republic, the President of the Reich, or members of the present or a previous republican-parliamentary Government of the Reich or any State.[6]

The administrative courts have worked out the effect of the official duties upon constitutional rights in considerable detail. Where officials in the course of their political activity criticize the Government they are expected to endeavour to exercise the rights in a peaceful and a technically impersonal fashion. They must not fight the Government either publicly or privately in a manner designed to stir up hatred, or agitate, or incite. What happens inside the Service is not to be made known to not directly interested outsiders. Complaints about superiors may not even be published in a service journal. Officials must be very careful not to defame their superiors, or to engender disaffection among officials and jeopardize the discipline and order of the Civil Service.

Thus the political activity of Civil Servants in Germany is limited

[1] *Entscheidungen des Oberverwaltungstribunals*, of 10 November 1921, Vol. 77, p. 495 ff., and 18 June 1923, Vol. 78, p. 445 ff.

[2] Reichsarbeitsministerium, 23.2.23. Cf. *Beamten-Archiv*, III, 344; and Prussian Minister des Innern, 15.7.25; *Beamten-Archiv*, V, 619.

[3] Arts. 82–84.

[4] Prussian Disciplinary Court, see *Deutsche Juristen Zeitung*, Vol. 24, p. 832.

[5] 21 July 1922, *Reichsgesetzblatt*, I, 590.

[6] Cf. also Anschutz, *Beamten und die Revolutionären Parteien* (1931).

and modified. Their position restricts for them the full scope of political rights in much the same way that English Civil Servants are limited, with this difference, that in Germany the clauses and modes of that limitation are constitutionally stated, publicly recorded, and judged, while in England they are matters for the Departments and the Treasury to decide. Civil Servants may act and speak politically, but all in a muted key. It should be noticed that in Germany some of the officials are definitely political officials,[1] that is, their position is such that they have wide discretion in the execution of the plans of the Central Government, they share, indeed, in the work of government in a very real sense, being in close and intimate contact with Ministers and sharing their confidence. These may, under no circumstances, work against the Government of the day, and may not attempt to criticize ministerial plans or projects in public.

On the whole, the Germans have worked out a rational system, not too hard upon the Civil Servants and not dangerous or derogatory to the authority of the State. The interests of the State are in the maintenance of its authority, and this is based upon its spiritual awefulness, its temporal dignity and efficiency. The limitations upon the Civil Servants are designed to safeguard these qualities in all their possible entirety from the effects of unrestrained democracy. These limitations ought not to be drawn too narrowly since too sharp a differentiation between officials and public is not good. Everything which can make for community of life and understanding of governors and governed is important. The mistake to be guarded against is that of being unjustly restrictive to the official.

This, owing to an unfortunate administrative history, the U.S.A. has not been able to avoid, and her present law and regulations are rather of the nature of an undue reaction from the blatant evils of the 'spoils' system than a national settlement of the problem of political activity.[2] The Civil Service Act of 1883 gives the Civil Service Commission power to aid the President in preparing suitable rules for the Civil Service, and the rule which appears first in the body promulgated by the President runs:

'No person in the executive Civil Service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express

[1] These were classified in an order made by the Reich Ministry of Justice, 16.2.23; Reichsjustizministerium; cf. *Beamten-Archiv*, III, 322. The best general treatise upon the subject since 1919 is Kottgen, *Das deutsche Berufsbeamtentum und die parlamentarische Demokratie*, Berlin, 1928.

[2] The same may be said of Australia, Canada, and South Africa, and the regulations of these countries are almost identical with those of U.S.A.

privately their opinions on all political subjects, shall take no active part in political management or in political campaigns. Legal opinions have defined this in detail.' [1]

Every year a number of such offences occur. The average for 1912–1928, a period of sixteen years, for which figures are fairly complete, shows that every year between seventy and eighty officials are found guilty, in various degrees, of political activity, and the figures for some years show that from two to three times this number are alleged to be guilty. We may guess that the numbers which ought to be tried and found guilty are vastly beyond these figures. Yet, even so, compared with the vast size of the Service, over 600,000, they are almost negligible. The offences increase in the Presidential years.

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If we reflect upon the various arrangements we have analysed, the most striking feature common to all is the insistence upon the need for the impartiality of the Civil Service. That is as grave and as important in a good political system as in a rationally created Constitution; and we have seen in fact that the German Constitution has gone so far as to include 'impartiality'. This is the first constitutional recognition of the significance of this administrative convention. It would, of course, rouse a deep feeling of injustice if taxpayers realized that the servants they were paying were indeed untrue to the principle that the majority's opinion shall prevail and that each minority has a free right to turn itself into a majority. For that is the principle violated when a Civil Servant injures the effectiveness of the Civil Service as an instrument of government, not to speak of what we have already analysed in detail elsewhere: the effects of partisanship on the technical efficiency of the Service. Resentment is bound to follow in a society where Civil Service and public stand to each other in their present-day relations: the one as a paid servant, the other as the employer. The situation would, of course, entirely change under a social system in which *all* were public servants; for then, as now, for the general public, the only way in which a dynamic element could play its rightful part in political development would be to allow freedom of criticism and political activity. The difficulty with a well-ordered society in which the lives of people are subject to a multitude of controls, and where rights are interlaced and well-balanced with duties, is that precisely this freedom of criticism cannot be allowed. At least it must flow through well-regulated channels, and must not impinge upon and threaten certain fundamental tenets--as, for example, the republican form of government in Germany, or in France [2]; and similar institutions in other countries which are there

[1] Cf. Annual Report, U.S. Civil Service Commissioners for any recent year, 'Civil Services Rules promulgated by the President and Legal Decisions, with Notes by the Commission.'

[2] Cf. Jèze, II, 91 ff.

guarded by the law relating to seditious offences. The more we wish to take for granted and securely to enjoy in the State, the less may we attack the foundations thereof. We shall find a similar train of thought embedded in the question of political candidatures.

POLITICAL CANDIDATURES

Neither Great Britain nor the U.S.A. allow political candidatures of Civil Servants. The early practice of the former was dictated by the fear that the Executive would dominate Parliament at a time when the Crown and Ministers showed every sign of desiring such domination. That fear has departed, but before it lost its efficacy it resulted in the theory of the Separation of Powers and its inscription in the Constitution of the U.S.A. and most of the American States.[1] The present situation,[2] which is very much the same for Australia and Canada, is dictated by the fear that the Civil Service would lose its reputation for impartiality if Civil Servants were allowed freely to become candidates and participate in the work of political assemblies. We have already quoted a passage from the report of the British Treasury Committee which reported upon this subject—impartiality is its theme. But there are other difficulties. The Civil Servant who becomes a member of Parliament might find it necessary to criticize his former chiefs, political and administrative, and to say things about his Department which would breed a very ugly spirit in his office. How could he, then, at the expiration of his term, be reinstated without disturbing personal friction? An alternative career would be created for some, and this would take their minds from their work; while the possibility of their translation to another sphere would cause all kinds of emotional disturbance among their colleagues and those seeking promotion. There is the further difficulty of their status in the Department when they return from their Parliamentary activities. All these and many more possibilities are not of such a nature that their importance can be gauged with any exactitude; we have no data upon which to judge how many people would be affected with the desire to be candidates, and how many adjustments would have to be made through their alarums and excursions. But a fear remains. The general practice of English-speaking countries is, then, to exclude candidatures for Parliament.

[1] Const., Art. 1, Sect. 7: 'No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.'

[2] Rule 1: 'No person in the executive Civil Service shall use his official authority and influence for the purpose of interfering with an election and affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified Service, while retaining the right to vote as they please and express privately their opinion on all political subjects, shall take no active part in political management or in political campaigns.'

The higher officials in Great Britain who are, by the nature of their duties, continually dabbling in politics, have not insisted on their claims. The subordinate officials have pointed out that officers of the Armed Forces had the right to enter Parliament. Dockyard workers, too, were in a condition of freedom in this respect.[1] Postal and Customs officials, however, and the clerical and administrative staffs were obliged to follow the rule (by Clause 16 of the Orders in Council of 1910) that 'any officer seeking a seat in the House of Commons shall resign his office as soon as he issues his address to the electors, or in any other manner publicly announces himself as a candidate'. The Treasury declaration first supporting this rule was made in 1884, and said that there would be public injury caused

'by any departure from the conditions which, under Parliamentary Government, render a Permanent Civil Service possible, and . . . among those conditions the essential one is that the members of such a service should remain free to serve the Government of the day, without necessarily exposing themselves to public charges of inconsistency or insincerity'.

The reply of Civil Servants [2] is that they ought to take as keen an interest and as controversial a part in politics as any other citizen. This does not impair their loyalty in administering a contrary policy, 'and in place of the existing restrictions on the expression of those views all that was required was a code of professional discretion such as that expected of barristers and solicitors'. They rely upon a 'professional ethic'. The Committee sustained the Treasury's opinion. Resignation on candidature is the Civil Service rule in regard to Parliamentary candidatures. As for municipal government, this, too, is regulated as it was before 1925: it is left to Departmental discretion, and permission is granted subject to such candidature involving moral or material interference with official duties. All members of the Blanesburgh Committee agreed that industrial staffs under the fighting departments should be exempt from these rules. Some members of the Committee went further, and agreed that exception should be made for industrial staffs in all departments, and also in the manipulative and some other subordinate grades.[3] An Order in Council of 1927 settled the situation by applying the rule forbidding candidature to all Civil Servants, temporary or not, established or not, excluding only industrial staffs in the Defence Departments.

France and Germany have a different history in this matter. In France up to 1852 there was a general tradition and practice of member ship of the Chamber and the Senate by the officials, until great abuses, both administrative and political, arose.[4] From 1852 dates the consti-

[1] See Report of Committee on the Parliamentary, etc., Candidature of Crown Servants, Cmd. 2408, 1925.
[2] Report, p. 14. [3] Report, paras. 62–4, 69.
[4] Cf. Pierre, *Traité* (5th Edn.), para. 337.

tutional principle that every paid public office is incompatible with the mandate of deputy to the legislative body. In 1875 this general rule was adopted [1] and even a list of exceptions kept the ordinary Civil Servant from the Chambers. Since 1919 [2] if an official is elected to a legislative body he ceases for the time being to be an official, since office and membership are incompatible, but does not lose pension rights.

In Germany [3] before the new Constitution, neither the Reich nor the States excluded officials from Parliamentary candidature and activity, and indeed, since the beginning of constitutional government in those States, special guarantees were created so that this activity might be unhindered. Later, under the kind of constitutional government pertaining before 1918 the difficulties of the double nature of the official, as official and private citizen, did not appear in all their severity. For the Government excluded from its service all but those likely to be its friends, and political parties had no very effective part in constitutional life. It was even to the interest of the Government to have its well-disciplined Civil Servants in the political assemblies as representatives of its point of view, as experts upon the subjects discussed, especially in committee, and as an addition to Government voting power.

Prior to the advent of constitutional Government, that is, under the despotism of the eighteenth century and its limited counterpart up till 1848, the 'people' found it rather to their interests to have officials included in the Estates and other representative bodies, since they were able, and occasionally in the van of political liberalism, and as such a counterweight to the influence of Court favourites. During the March days of 1848 liberal opinion, following the constitutional development of France, England and the U.S.A., tended to demand the exclusion of officials from the Assemblies, but other currents of opinion resisted, and the end was the maintenance of unlimited freedom of entry into Parliament, and the rules which had previously been made to secure that officials should not find themselves dismissed for their ambitions, or even experience undue hardship in obtaining leave (*Urlaub*) to which they had a statutory right.[4] Until the entry into force of the Constitution of 1919, the situation in the Reich and Prussia, and almost all other States with small variations,

[1] Law, 30 Nov. 1875, Art. 8: 'The exercise of public office paid out of State moneys is incompatible with the mandate of deputy.'

[2] By the combined effect of the Law of 30 December 1913, Art. 33, and the Law of 21 October 1919.

[3] The history of the German law and practice is very ably described in Clausz, *Der Staatsbeamte als Abgeordneter*, Karlsruhe, 1906.

[4] The constitutional Assembly of the North German Confederation, 1867, consisted of 40 per cent. of active Civil Servants, and the same proportion appeared in the Prussian Diet. Thirty per cent. of the German Reichstag were active officials; in 1898–9 the percentage was 15 per cent. It must be remembered that judges and teachers were included in these percentages.

was that all officials had unconditional freedom to participate in parliamentary and local government [1]; they obtained leave automatically upon election. This leave extended to the full session of the Assembly and to short adjournments, but not to long prorogations. Officials were secured by special regulations against having to meet the cost of their departmental deputies out of their salaries. The prevailing opinion on the merits of this situation was that it was wise to leave the matter alone substantially, and only to clear away small points of difficulty which arose in practice. In supporting the existing situation were these considerations: the technical ability of officials, the loss to the dignity of the Service if they were denied the free expression of opinion, and the value of their impartiality in assemblies which were more and more becoming a prey to violent economic and social conflicts. Against the maintenance of the right of candidature, were the difficulties felt by the officials in combining office with party activity, the disorganization caused by sudden departures without leave and proper arrangements previously made, and from the point of view of the public and the parties of the Left, the increase of Government influence by the activity and votes of parliamentary Civil Servants.[2]

The new Constitution has, on the whole, reiterated the freedom of political candidature. Article 128 gives 'all citizens without distinction' the right to participate in public office, 'in the measure allowed by the laws and in correspondence with their competence and services'. Then Article 39 [3] says: 'Officials and members of the armed forces need no leave for the exercise of their office as members for the Reichstag or State Parliament.' This part of Article 39 is word for word the same as Article 21 of the Constitution of 1871. But the second part of this Article introduces a novelty which is a significant extension of the right of free candidature. 'If they attempt to acquire a seat in these bodies, then they must be granted the leave necessary for preparations for the election.' The first three constitutional projects allowed 'suitable' (*angemessen*) leave. But the constitutional committee omitted this word in the fourth project. This left the word 'leave' without any qualification, so that both the official and his superior would have found difficulty in knowing how much leave was to be taken or given. The difficulty was recognized by the National Assembly. The criticisms raised [4] resulted in the inclusion of the word 'necessary' (*erforderlich*), the precise meaning

[1] Cf. Constitution, 1871, Art. 21. [2] Clausz, op. cit., p. 186 ff.

[3] Cf. also Art. 11 of the Prussian Constitution: 'State officials, employees and workers and corporations of public law need no permission to exercise the activity of a member of parliament. If they become candidates for the Landtag the necessary time for preparation for their election is to be given. They continue to be paid their salaries and wages.

[4] Heilfron, op. cit.

of which is left to the head of the Department. No such leave preparatory to elections for the local authorities can be obtained, as it was thought that this would result in frivolous candidatures for the mere purpose of obtaining a holiday. Leave extends to the session, short recesses [1] and any activities during recess which are closely connected with the official's election mandate, as, for example, membership of a parliamentary committee, participation in party meetings and meetings of electors, but this must be applied for in good time with the necessary evidence.[2]

Germany had a very different problem to solve in the matter of political candidatures and activity, for her political system before the War was radically different, both constitutionally and administratively, from the present organization. The country assumed the democratic method at a time when it was under serious and valid criticism, in spite of its many good features. Germany was badly scared by the rapid succession of short-lived governments, and the instability of political life, in the great states of to-day, and was especially anxious about the chronic defectiveness of French parliamentarism which has never been able to create an independent and efficient Civil Service. It was an act of great political bravery to dare the possible effects of democratic government upon the administrative system, but this was done. The result is that Germany is the most liberal country in the world in her interpretation of the rights of officials to participate in political life. The interesting thing to observe is how far the system will be ultimately tenable, and whether it will be forced to make concessions to the necessities of the Service by the reduction of this freedom.

The countries whose experience we have reviewed in relation to the political rights of Civil Servants may be grouped according to their optimism, Germany being the best, indeed, the only example of this, and their fear, derived from sad experience, as in the case of the Anglo-Saxon countries and France, where the priority, both in time and social significance, of democracy to administrative organization, caused, until quite recently, the utter demoralization of the Service.

Impartiality and Continuity. Unwillingness to give officials any extensive political freedom is not due to mere caprice; it is due to the recognition, sometimes clear, sometimes vague, of the public importance of impartiality in the Civil Service—and it is a widespread

[1] Brand, op. cit., p. 464. 'Short recess' means not more than fourteen working days.

[2] A distinction is made between the liberties connected with participation in a representative assembly and that in a local *executive* body. Cf. Brand, Sect. 148. These are deemed to be offices in the sense of employments, additional to official employments, and permission must be obtained from the head of the department before they can be accepted. This is, as a rule, granted without excessive formality; but it depends upon whether the office sought is likely to take up too much time.

and insistent recognition. We have seen this purpose immanent in the whole range of political activities—the State must not be injured, it must go on. Whatever the changes in the political constellation, however great the shocks in the world of political conflict and however violent its revolutions, the State, which is certainty, regularity, order, must continue. It must not cease: cessation is mortal. The instrument of continuity of services, which *ex hypothesi* are vital, is the Civil Service. Conceive the social and economic loss in modern England or Germany or the U.S.A. if the administrative services were the sport of political parties; the waste of organization, technique, expertness, professional zeal and the adaptation which comes of years of regular and uninterrupted devotion to duties! All parties in the State must be sure of a highly efficient instrument, however diverse their policies, for no policy is worth the paper it is written on unless there is an executive force behind it. Parties may differ on all things, but one thing is their common desire: power when they are in office, and such power is executive power. Our chief hope that political ministers and a helpless public will be prepared to learn from real science, resides in the flawless impartiality of their experts; and only the fact will create the confidence.

It is not surprising, therefore, that Germany has inscribed official impartiality or neutrality into its Constitution; that France moves towards such a condition, though her rules and practice are chaotic and incoherent; that the Anglo-Saxon countries above all have created stringent prohibitions designed to serve political neutrality. The Anglo-Saxon countries are rightly afraid of their former selves. The question is whether in the present condition of acute political conflict in modern times this important constitutional rule can be maintained. For the more severe the struggle the greater the temptation to use every means, legitimate or illegitimate, noble and base, to secure *political* advantage, that is, to win power over the adversary. In Great Britain, so far, the staff has been ready to serve any whom the elections and Parliament designated as the Government. It is generally believed that this readiness will permanently prevail. This contention was well supported by the severe test of the Labour Party's first tenure of office.

'I and my colleagues in the House of Commons', said Mr. Sidney Webb, 'have had the experience of coming as new people to offices which might legitimately have presumptions and traditions against us, and I am sure I am speaking for all my colleagues when I say that we have nothing to complain of in regard to the loyalty, fidelity and zeal with which we found ourselves assisted during our short period of office.' (April 14th, 1924.)

It should, however, be said that at no time in English political history have these qualities of neutrality been subjected to a really crucial test. We have yet to see whether Civil Service neutrality can

be maintained if burdened with any vital problem of conscience. We must not be too sanguine that our future is likely to be as free of social cleavage as our past. It should be remembered that during the General Strike of 1926, a large number of Civil Servants would not, on conscientious grounds, volunteer for duties outside those for which they were expressly engaged. Feelings were roused to a pitch where numbers of Civil Servants seceded from their association because they thought it had taken up a 'disloyal' attitude. There are times, in fact, when the policy of a Government directly affects the vital nature of the State. We should be foolish to imagine that old habits will continue to rule in such trying days. France is a chronic sufferer from official partiality—or at least politicians pretend so. Excellent old Civil Servants in Germany attempted to sabotage the revolution of 1918, and went a long way towards accomplishing their aim [1]; and even to-day the irreconcilability of parties produces a state of suspicion in which capable servants are obliged to leave. Yet the sense of service of the State made the Civil Service the saviours of Germany in the Revolution. It will be noticed that Germany in its 'political' officials, France by political Under-Secretaries and occasional favouritism, and the U.S.A. by the number of offices of high administrative rank which may still be included in 'spoils', have allowed themselves a safety-valve—official neutrality is not expected of them, indeed, the opposite is required, and appointments take place to secure the subservience of these officials to those who appoint them. We shall not press this analysis any further, excepting to say, that this impartiality will depend for its efficiency in the future more and more upon the deliberate training of officials to this end. We recall the opinions about official education expressed in Germany. It will be remembered that various writers insisted on the need for such a training in the social services that Civil Servants would be qualified to take a non-party view, a view transcending parties: as one writer has it, they represent '*the integrity of pure State mentality*',[2] another, 'they serve the common good'.

[1] Giese *Das Beamtentum im deutschen Volksstaat* (1924) argues that Civil Servants ought to take the same attitude towards their service as Frederick the Great to the State—they held their powers, not for personal enjoyment, but as first servants of the State. Further, the Service relationship is not to any *personal* superiors or masters, but to the State. 'If this, the only right constitutional view, had been a common possession of the German Civil Service then fewer officials would have fallen into so difficult a conflict of consciences on the fall of the monarchy and the entry of the republican ministers, since they felt obliged to their imperial or royal masters, instead of, properly, to the Empire or their State, many believed that they might not recognize any other institution as official chiefs, although the new institutions embodied no other than the real and hitherto existent Chief of the Service, namely, the State.' Cf. also Kleinstuck, *Vom Wesen des deutschen Beamtentums*, p. 30.

[2] Cf. Harms, *Recht und Staat*, II, 32; cf. also Hartung und Leisegang, *Berufsbeamtentum, Volksstaat und Ethik*, 1931; Volkland, *Die Beamtenschaft und das Problem Staat und Volk*, 1927.

Prince von Bülow once characterized the situation of a Minister under the German constitutional State as follows [1]: 'The practical principles which a Minister has to live up to are very different in character from the principles recognized by a party man; they belong to the sphere of *State policy*, not to party politics.' This is not far off from the direction in which the education of officials must proceed: although they, of course, must, if the Parliamentary system is to be workable, give that counsel extracted from their *State policy* which responsible Ministers require, in order to make and execute laws in accordance with their party policy.[2] *Above all, neutrality does not mean timidity of the official expert: it implies the energetic tender of advice.*[3]

The next topic is closely related to the problem of impartiality of the Civil Service, and its discussion will enable us to throw more light on the character of the modern Civil Service and the modern State—it is the problem of the Right to Associate and to Strike. This involves resistance to the power of the State, and the threat of resistance inherent in these rights at once calls forth the State's defence of itself. In this defence we may learn more about its nature—what its defenders consider to be most vital to it.

RIGHT TO ASSOCIATE AND THE RIGHT TO STRIKE

The modern claim to associate in industrial and professional unions is, broadly, the claim to exert pressure upon employers for various ends, mainly economic. Association takes place for other reasons also: for mutual aid against the common risks of life and for the combined organization of pleasure and study. Mingled with these reasons is another which, from a general social standpoint, is of far more importance: the defence and pursuit of economic interests; for through the employer, pressure is directly exerted upon that portion of the community which consumes the product of those associated, and this, in turn, affects the economic position of other circles. Associations within the Civil Service may at any moment find it necessary to exert pressure upon their employer, that is, the Treasury, and through that, Parliament and the Public.

The position of Civil Service associations is peculiar in that the services of their members are rendered to a peculiarly wide public, in some cases to almost every inhabitant of the country; their services are as a rule monopolies, that is, there is no alternative source of

[1] *Imperial Germany* (1916 Edn.), p. 187

[2] One difficulty regarding this has been felt in Germany, where, of course, the problem is acutest: 'Will it not', I have been asked, 'reduce the joy in office and sense of creativeness, if officials give advice and it is sometimes not taken?' I suppose they will be disappointed, but like all who hold an office, of any kind, they will get used to the limitations imposed by the nature of their office, and grow in their mentality the protection against disappointment. Moreover, they are not worse off than the solicitor or any other expert.

[3] See end of chapter, p. 1424.

supply; the services they render are of a particularly vital nature to society, indeed, that is why they have become socialized; and, finally, the employer is the State, an institution of which undisputed authority is the essence, because that authority is so necessary and at the same time so liable to daily dispute. The State is a condition of subjection for us all, no matter what rights we obtain from this subjection; and so many are ready to throw off this subjection when the opportunity offers, that the State is forced to be especially stern. It is such a master that the Civil Service possesses. There are other, secondary, peculiarities, and these clearly emerge from the discussion of the right to associate among Civil Servants, and they determine, as we shall now see, the extent to which associations and the right to strike are permitted.

Associations and strikes have no inherent virtues and vices; these are no more than consequences of their purpose and actual use. Associations in the Civil Service have originated, like trade unions, to reform abuses and procure the amelioration of working conditions. They were a product of the nineteenth century, but of the late nineteenth-century. They become most numerous and insistent in certain social conditions: the worse the conditions of employment in the Civil Service, the greater the number of associations and their fierceness of temper; the more developed certain theories of the State, the more factional and disruptive the associations.

France. France entered the last quarter of the nineteenth century with an administrative system full of mortal abuses. Uncertainty of tenure, rank, political favouritism in recruitment and promotion, classification which raised inequality of working conditions and salaries to the level of an organized system, spying and counter-spying on the private, political and religious activities of the Civil Servants, no guarantees that disciplinary measures would be justly conducted, contempt from Parliament and the public these were the main features of French administration. The Law of Associations of 21 March 1884 was the culminating-point of a long and arduous struggle of workers and professions of all kinds to secure the right of association This law gave workers exercising the same professions or allied vocations the right to unite without authorization in associations for the study and defence of their economic, industrial, commercial and agricultural interests.[1] These associations could federate among themselves. The result of this law was the speedy formation of a host of syndicates, the originators of the modern French trade-union movement, centering in the *Confédération Générale du Travail.* No one during the course of the debates on the law of 1884 had dreamt of including the officials in their plans or prophecies; but, at first slowly, and then with a rush, officials perceived the advantages of

[1] Cf. Pic, *Traité de Législation Industrielle*, p. 216 ff.; and Lefas, op. cit., p. 140.

organization and began to establish associations. The elementary school teachers made an attempt at founding a National Union. The administration stopped them. In 1887 the Minister of Education himself intervened with a letter addressed to the Prefect forbidding such associations as 'manifestly incompatible with the very notion of a public function'.[1] Road-sweepers, navvies, and similar workers in municipal employ made attempts of a like nature, were forbidden to proceed by the Prefect and the Ministry of Public Works, but maintained a furtive existence. Other State employees in the tobacco and match factories were more successful—they were not counted among Civil Servants: in this way, but after an opposition which cost the Casimir-Périer Cabinet its life in 1894, the State railway employees were admitted to have a right to associate. These concessions were made upon the theory that such employees were not assimilable to Civil Servants, but to employees in similar public utilities, privately managed. Meanwhile one Minister of Education after another was combating the attempts of the teachers to form associations.

The Government could not permanently repress the movements and, therefore, the Radical Ministry of 1894 containing Waldeck-Rousseau as Prime Minister, and M. Millerand, a Socialist, Minister of Commerce, decided to still the tempest by allowing the associations to come into being under their good-natured sponsorship. Many associations came into being, the principal ones being those instituted by the Postal, Telegraph and Telephone services. The teachers got their way. The mailed fist gave place to the approving smile: all in the vain hope that the associations would not defend themselves when attacked, and that they would be the friends of Republican and Anti-Clerical governments. For France was tempest-tossed domestically and internationally, and peace and unity at any price was desired, in order that monarchism, ultramontanism and the foreign enemy might at need be vanquished. Official approval begot associations all through the Civil Service. But official approval had not counted that the right of association might be construed, as for ordinary industry, into the right to the defence of professional interests. The manipulative employees, postal officials, warders, those in the public works departments and municipalities, and teachers, wanted more than the mere right of peaceful coalition. They wished full rights under the Law of 1884. This was never accorded them by their masters, nor could they obtain it, legally, under the Statute of 1884, for this was *limitative*: it limited the right to syndicate, i.e. to be an association with rights of aggression, to 'economic, industrial, commercial and agricultural' interests. Yet outside it there was not even a legal right to form associations. In 1901, a new Law on Associations gave

[1] Harmignie, *L'État et ses Agents*, p. 13.

the Government an opportunity to meet the demands of Civil Servants for associations without specifically according the right to strike as possessed by ordinary associations of private employees. *All* citizens could now form *associations*, with certain specific exceptions, but in these exceptions Civil Servants were not included. The result was an enormous expansion in the number of associations.

The ardent spirits among them are dissatisfied with this position, and desire rights which, for example, under the Act of 1884, would give them fighting power. But to the ardour of the workers' leaders must be added the effect of syndicalist theory which for the French public services has been worked out by writers like Maxime Leroy [1] and Paul-Boncour.[2] These desire the break-up of the present centralized State, and the division of political and administrative power among vocational associations of which the public services are only special aspects. The central co-ordinating body composed of delegates of the associations would issue general rules, and within their wide confine, the public service syndicates would arrange for their execution. There would be an end of the interference of Parliament in petty matters, and the syndicates would be able to regulate all their vocational interests, technical and economic, in a rational manner hitherto unknown in the politically demoralized condition of the French Civil Service.[3]

We need not proceed to a further analysis of the syndicalist theory. But the resistance to the power of Civil Service associations contains arguments of great import in the modern State.

The first impulse of resistance is simply authoritarian. There is an instinctive feeling that the State will crumble, or, at least, will be severely shaken by the existence of associations. For, however peaceful the intentions of the associations, any body which unites members with a definite and special interest becomes suspect. Adam Smith observed this when he said that whenever he saw two bakers speaking together he suspected a conspiracy against the public. And the history of associations, corporations and guilds, especially in France, has been one to deepen this suspicion.

'The Government could not', said M. Loubet in a circular in 1888, 'without abdicating its legitimate authority, allow civil servants of any department to establish a federation, destined to oppose an occult power against the legal authority.' [4]

The Minister of Commerce said in 1891 :

[1] *Les transformations de la puissance publique.*

[2] 'Les Syndicats des fonctionnaires devant le parlement' (*Revue Socialiste*, January, 1906).

[3] This subject is treated in the last chapter of Laski, *Authority in the Modern State*. The most recent contribution is by Mer, *Le syndicalisme des fonctionnaires*, 1930.

[4] Cited Harmignie, op. cit., p. 202.

'If they could carry out for their own profit the law of professional unions, it would be against the nation itself, against the general interests of the country, against the national sovereignty, that they would organize the struggle.' [1]

M. Barthou, in 1906, has the same suspicion (by this time with ampler justification):

'When the State manufactures tobacco and matches, it does not see any reason for refusing to its workers, any more than to private employees, the right to form trade unions. But when it exercises, in a general interest, the functions and the rights of the public authority, can it authorize civil servants to turn against it, equal to equal, in an imperative and menacing manner, the very authority with which it is invested? Now notice that after the postmen and the teachers, the customs officers and the tax officials have demanded the right to form trade unions. There is only one word to characterize such a state of affairs: anarchy. . . . The public service associations are violating the law; they are going counter to good sense, they are defying public order.' [2]

That is the context in which many people see this problem: it is defiance to the State, a threat to public order, a menace to sovereignty, indeed, mutiny. Defiance to the State! 'Civil servants who share in public authority form a part of one corporation only, that which is the State—the Nation itself!' [3] 'To form a Trade Union . . . would be on the part of civil servants open warfare against the Nation!' [4] The gist of these arguments is pure fear of anarchy, and Parliamentary conceit: deadening to liberty and provocative of violence, open or subterranean, and irrational repression.

Security of Status imposes Obligations. A more rational view, a reasoned opinion regarding the exceptional position of the public servant, is the second line of defence against the right to associate. This was best expressed by one of the earliest essays in resistance. M. Spuller, Minister of Education, quashed the attempt made in 1887 of the teachers to form a Trade Union. His circular ran:

'A public situation is not a profession, in the same way as official pay (*traitement*) is not a salary. The salary of the workman is higgled over penny by penny by him and the employer. . . . Both of them ask but one thing of the State: liberty of struggle and competition. . . . But official pay is, on the contrary, fixed by law and is not alterable except by the law. If we suppose that the pay seems small, is there any one of us who will pretend that officials have the right to form an association and if necessary go on strike to force the State to increase the scale? . . .

'Is it not evident that once he has become a member of the national administration, the teacher cannot turn by turn present himself as an official, and in this quality receive fixed pay, demand guarantees of security, or to put it more clearly, irremovability, excepting for disciplinary penalty, and have the right to a pension; and then, all of a sudden, changing his character, put himself

[1] Jules Roche, Chamber of Deputies, *J.O.*, 17 November 1891.
[2] Harmignie, op. cit., p. 157
[3] Rouvier, Chamber of Deputies, 22 May 1905. [4] Jules Roche, loc. cit.

forward as a free worker, and demand, through the right of association, the means of defending his interests against the State, as a workman defends his at his own risk and peril against his employer ? ' [1]

Many a Minister later made use of these same arguments: The Civil Servant has a secured status which imposes obligations upon other citizens. If he accepts that status he must, in return, relinquish the right to secure better terms by a show of force. We are obliged to guess at the fundamental ideas of State employment involved in this type of argument, for they are never stated. Probably people who argue in this way really mean that the State, through Parliament, has carefully considered in what exact measure the services it renders are socially important; and it has translated this estimate into terms of an amount of money in the budget. This expenditure was carefully related to the income of the country, its revenues, and the general currents of social and political thought. The State cannot do more than this, and, offering the salaries and other expenses of administration in the measure which it does, it is only able to continue to afford them if it obtains the calculated amount of service in a loyal, willing and uninterrupted fashion. If these conditions are not observed, if slack service, skulking, and interruptions occur, the national ability to pay is dissipated, and all State arrangements fall to the ground. The Civil Servant ought to recognize all this when he leaves private life for the public service; and in recognizing this he must give up his pretensions to act violently by the State. It is a matter of State efficiency, directly inherent in the non-profit basis of State services, and not only a matter of the dignity of the State. This seems to us the only rational foundation of this type of argument; for merely to say that once the terms are accepted one should not kick against the pricks is puerile; one must show good cause why the pricks exist. It is not enough to say, as M. Briand once said, that the State has not the same elasticity in its financial arrangements as a private firm.[2] Whether that really means anything is a doubtful point: and if it did mean what it appears to mean, and if that meaning were true (that the State cannot demand and obtain more revenue promptly), it would still have to be explained why this is so. And when M. Clemenceau sonorously recounts the advantages of State employment—peacefulness and certainty[3]—he is still obliged to say why not more of these can be given at the demand of the officials; but he does not.

Continuity. Indeed, these arguments are but the unimportant outposts of the central and vital vindication against the

[1] Lefas, pp. 143, 144.

[2] Chambre des Députés, *J.O.*, 13 May 1907, p. 975. Briand's views regarding the strike underwent a mighty transformation between the time when he was seeking a seat in Parliament, and the day when he became Minister.

[3] Cf. Harmignie, p. 149 (April 1907: letter to the teachers).

right of association. The right of association (with or without the right to strike) always offers a threat to the continuity of the services, unless the right is much limited. But the mere right of association, even with limitations, still constitutes a possible challenge to the purposes of the State; for once the right is granted, even with limitations, even upon sufferance, a psychological condition is established—one of group conceit, a consciousness of identity and power, separatist in feeling, liable to resist the aims of the State by the cessation of work. Now in private employment (comparatively) such a feeling and such a liability do not matter very much: only a master is inconvenienced or ruined by such behaviour; and, as for the consumers, they have alternative sources of supply.[1] But the services of the State are, *ex hypothesi*, vital in their nature, and as a rule monopolies,—there is no alternative source of supply. They have been deliberately and especially selected from among many things made and services rendered spontaneously by developing society as being of a fundamental nature, which neither prudence nor compassion could leave to the free play of supply and demand. They have become essentials of modern existence: they are indispensable. Therefore those who undertake them may not jeopardize their existence by the strike or threat of a strike. People cannot even bear to think that they might cease: for if such a thought became widespread, uncertainty would have entered, and certainty is the essence of social efficiency.

The theory which we have just expounded has never been fully analysed in France, though Hauriou,[2] Duguit,[3] and Jèze[4] go quite far.

[1] This, of course, becomes less and less true, as the process of amalgamation proceeds; and we have shown that as this occurs in vital commodities, rather in management, plant, finance or labour, the State forbids strikes and lock-outs. Cf. Chap. II, Politics and Economics.

[2] Hauriou, Note in *Conseil d'État*, 7 August 1909, Sirey, III Partie, 145 ff., *re* dismissal of officials on strike, without previous communication of *dossier* (Law, April, 1905). 'In effect, by the acceptance of the employment conferred upon him the official submits to all the obligations deriving from the very necessities of the public services, and renounces altogether and for always faculties incompatible with a *continuity essential to the national life . . these fundamental conditions of the* existence of a State demand, on the one side, that the public services indispensable to national life shall not be interrupted, and, on the other part, that officials shall live in peace with the Government. Let us observe that we appeal, not to the *raison d'État*, which is a dangerous notion, because the well-being of the State may often appear to be connected with momentary circumstances, but to the theory of the unconstitutionality of the laws, which cannot be invoked except in regard to the permanent condition of State life, which doctrine and jurisprudence shall have already determined, and which, in consequence, would not permit of surprises.'

[3] *Traité*, III, Chap. IV.

[4] Jèze, II, 246: 'The idea of the public service has other necessary consequences: public servants are forbidden all actions which might stop or go counter to the regular normal and continuous functioning of the public service.' The State is to subordinate the public to the private interests. We have great respect for these writers, and would not wish to do them any injustice. Their conclusions we think to be right, but the grounds of those conclusions seem to us not to have been fully developed. The best analysis is, perhaps, in the pleading of *Tardieu*, Commissioner of the Govern-

Various authors and politicians are impressed with the fact that State services are monopolies and that if their supply ceases there is no alternative source. But they do not pursue their analysis to its base, namely, that social life would be badly injured. The politicians have only realized its fundamental meaning when there has been a strike, as in the arsenals, the posts and the railways. In those cases it seems to me they have rather been incensed that something called National Sovereignty, or the Public, has been defied, than understood the exact meaning of the strike.[1]

The proper line of resistance to strikes in the public service was taken in a Bill to regulate the right to strike, placed before the Senate in 1895. This differed from previous bills of a like nature in that it distinguished between public services indispensable to the life of the State, and others. The Minister who introduced the Bill said [2]:

'It is necessary to distinguish among the different enterprises those which constitute public services properly so-called, affecting the general order and even the security of the country, from those which involve nothing other than a question of finance. . . . It is only there that the very principle of nationhood is at stake, that the right of demanding exceptional protection for it appears to be incontestable.'

They were services of such importance that they had been exempted in the law on the recruitment of the Army (1889), from immediate mobilization: for example, firemen, road workers, dockers, surgeons, chemists of the *hospices*; workers in the penitentiaries, forest officials, customs, posts and telegraphs, and the technical administrative sections of the railway services; inland revenue officials, the administrative officials in the State tobacco factories, and the Bank of France.

This and other bills of a like nature never passed beyond their preliminary stages.

Nor did the soundness of this reasoning ever proceed beyond the inkling of it which we have quoted. Instead, France was delivered over to Parliamentary tergiversation of a most dishonourable and despicable kind, and the futile logic chopping of constitutional lawyers, who commenced with abstractions and ended with abstractions. Parliamentary futility ended in postal strikes in 1906 and twice in 1909. The first strike of 1909 lasted a little over a week, and what imagination could not teach, the facts did. Paris was isolated from the rest of France and the world; the Minister of Foreign Affairs could get no news about the Balkan crisis, several most urgent tele-

ment, before the *Conseil d'État* in the affaire *Winkel*, Sirey, 1909: same reference as in Note to Hauriou.

[1] Also they were struck with fear, or said they were, regarding national defence. A strike left open the frontiers! This was a powerful argument on the Continent before 1914.

[2] Trarieux, Sénat, Débats, 4 March 1895, and Documents, 1895, No. 38. Cf. Lefas, pp. 180–2.

grams being delayed; business began to languish, as prompt and exact information was impossible to obtain; the food supply of Paris was momentarily endangered; the Stock Exchange was so badly stricken that the effects were felt in London, Brussels and Berlin. Then, later in the year, a more nationalized cessation of work took place and lasted ten days; similar effects were felt, and to them was added the sabotage of material.

The results were vindictiveness against the officials' leaders, some reforms, the strengthening of governmental feeling against the associations, and the introduction of a number of bills before Parliament to establish *le statut des fonctionnaires*, that is, a code of working conditions for officials, in place of the numerous unintegrated regulations adopted piecemeal, and many of them liable to violation by the Minister. Such attempts at a *statut* had been unsuccessfully made at various times in the nineteenth century, and in 1903 and 1906 protests and reports were again brought before the Chambers. Parliamentary and administrative circumlocution killed an even greater effort in 1909 by the Briand Ministry. In this project the right to strike was strictly forbidden, and the intervention of the Courts of Discipline provided for in other parts of the Bill to deal with disciplinary cases, was, in the case of strikes, excluded—without their intervention and without specified formalities all the disciplinary penalties could be pronounced.[1] Further, penalties were provided for provocation to strike by unions and associations.[2] Nor was any affiliation with the general labour organizations permitted. Although the law was not passed—it was not even put to the vote—these principles are maintained to-day by French governments: (*a*) no right to strike; (*b*) a right of association [3]; and to federation among associations [4]; (c) the right of the associations to challenge all administrative decisions interesting them before the *Conseil d'État* [5]; (*d*) but no federation with other than Civil Servants' associations.[6]

The Contract of Service. Legal theorists have differentiated between *agents* or *fonctionnaires de gestion* and *agents* or *fonctionnaires d'autorité*. In the former class are all officials who are merely executive, without discretion, involving public authority, that is, not essentially part of the State, and perfectly assimilable to ordinary private employees; while the latter class consists of those who are more intimately connected with the governing power. It does not

[1] Art. 22. [2] Art. 33.

[3] Law of 1901 and *Conseil d'État*, 10 December 1909, etc. Cf. Hauriou, *Droit Administratif*, p. 250.

[4] Cf. Hauriou, op. cit., p. 253.

[5] Yet this power was somewhat restricted in 1921 and 1922 after the general strike of 1920.

[6] Forbidden by the project of Law of June 1920 (which did not pass) and maintained by administrative action.

matter so much whether the former class are subjected to the State, the lawyers argue, but certainly the officials 'of authority' must be.

This distinction has given rise to a long discussion, every lawyer having a different system, pedantically created out of words challenged by every one else, and satisfactory to himself, but rejected with contempt by his 'dear' colleagues. The process of argument has been as follows: Is this distinction between *agents de gestion* and *autorité* tenable? The lawyers answer Yes![1] Since this distinction is valid it can be at once translated into terms of the law of contract: the *agents de gestion* come within the category of private contracts, the others, in the category of public law. In the first case the State is simply an *employer*, in the second it is the *Sovereign-Power*. Syndicalists like Leroy[2] are especially devoted to this dichotomy, because all the employees falling in the first category are thus placed on a complete par as to their liberties with ordinary private workers. But lawyers in general, German as well as French, have at the minimum indicated this distinction even if they have not, like the French, drawn the same conclusions.[3] The distinction is observable in the French law on the insulting of officials. Only the higher grades—the *agents d'autorité*—are protected.[4] To insult the rest is to insult only a man, not an official.

Arrived at this point the lawyers feel entitled to get over their difficulties by making havoc of the law of contract. (1) Does not the State contract just like a private company with the *agents de gestion*? Yes; for the State has often been compelled to pay damages like any ordinary citizen for a civil wrong. The *Conseil d'État* has admitted that in its judgements. (2) The object of the relationship between the State and the employee—is this not one that can be made by simple contract? To carry letters, count cards, add up figures, and sweep trains, are these not everyday objects of private contract? Yes; then why make a difference between the State and a private company? (3) What end is pursued by the contracting parties? Is not the State pursuing a simple end in treating with an individual; and is not the individual intent upon pursuing only his own interests and nothing more? This is so. Then the contract is identical with ordinary private contracts.

It is extraordinary how this legal nonsense has blinded the eyes of otherwise clever people to the real facts of the situation. What has

[1] Thus Hauriou, Duguit, Barthélemy. But Jèze says that the distinction has broken down. Cf. op. cit., II, 238.

[2] Cf. op. cit., pp. 130-2.

[3] Laband, e.g., indicates the distinction, but says no discrimination as to rights is made upon its basis, and suggests none. Bluntschli makes a threefold division, thus: officials with a power of command; the assistants of these, without independent scope; domestics, like porters, messengers, etc.

[4] Cf. Harmignie, pp. 165, 166.

the question of contract got to do with this problem? If it revealed the complete identity of public and private service it would not have proved that the former must have the same freedom as the latter; an alternative would still be possible, that the latter should be regulated like the former. The lawyers, instead of clearing up the issue, have simply wrapped it in unrelievable obscurity. For they have entirely left out of account the sociological nature of the Civil Service, the nature of its services to society, its relationship to political parties and representative assemblies, the reasons why the services were made public. These are the factors by which law is nourished and made fruitful; and all of them have been neglected for a diet of abstractions and definitions derived from codes of law prepared for entirely different situations arising under entirely different conditions of society and having nothing whatever to do with the present question.

French lawyers have focussed their minds upon the nature of the contract made, the present condition of the contract, but this is not the problem. The problem is, what compels the State to demand submission of Civil Servants and to offer the conditions it does?[1] It is in what lies behind the law, not what is expressible in its inelastic formulæ, that the political scientist is interested. The State includes in its terms the prohibition of strikes for *all* Civil Servants. Why? Not because it has not learnt the law of contract in the university schools; but because of certain overpowering necessities. It is precisely these necessities which we desire to discover. Even the enlightened Duguit by equating the State with a 'public service corporation' (which was overstepping the mark), and by his attacks upon the theory of the moral personality of the State, an important service to law and political science, has lent his authority to the school which divides the Civil Service into two classes; and he says the *agents de gestion* are properly to be put on a par with private employees, although he himself cannot and does not make this distinction, but puts all public servants on a similar footing, demanding the right to associate for all of them.[2] *For the erroneous notion that the State is a 'public service corporation' and nothing more, by missing out the social conscience which the State imposes upon individual consciences when it undertakes a service, strips the State of its essential character.* The conclusion is then easy, but full of error. And the attack on the moral personality of the State can go too far, for in destroying the notion of personality it may deny that its purpose is moral.[3]

[1] Cf., e.g., the strictness with which Jèze and others interpret the disciplinary rights of the official superiors. Cf. also this statement, which is given on good authority, by Lefas (*Civil Service in the Modern State*, Chicago, 1930, p. 239): 'The Civil Servant is attached body and soul to the public service. The status of Civil Servant does not leave him for a single instant even when distant from his office.'

[2] *Revue du droit public*, 1907, p. 410 ff.

[3] Moral—not whether it is a good or bad morality.

The truth is that *all* public servants are employed in work which is of a specially important character in society, and the reason which compels the public and Parliament to draw these services out of the hands of private industry is like the force which is applied at one end of a rod or a length of string; Mechanics proves that this force is present not merely at the ends or at any separate spot in the length, but pertains all through the length and gives every particle in the length a character equally peculiar. Thus, in the public services, the essential quality of being public, the why and wherefore of their socialized nature, pervades the whole. Some part of the Civil Servant's activity, whether he is in the immediate confidence of the Minister and gives orders to thousands of subordinates, or whether he is a post-office messenger boy, the temporary master of nothing more than a second-hand bicycle which is not his property,—some part of the Civil Servant's activity is State-determined, it lives and operates in virtue of that peculiar fellowship and conscience called the State, it derives its character from the State, and would be otherwise were it not of the State. To ignore this is to be unaware of the nature of the State or to have petrified the State in a legal formula which has no counterpart in life. Harmignie, who has collected and analysed the French theories of *agents de gestion* and *agents d'autorité*, says quite rightly that if you take any particular act it is fairly easy to decide whether it is one or the other—an *acte de gestion* or *d'autorité*, but it is almost impossible to distinguish the *officials* into these classes, 'because the same individual accomplishes now one, now the other kind of action.'[1] And different theorists and politicians have drawn their lines of demarcation in the varying places. Harmignie includes teachers, postal officials and the clerical staff of the ministries in *agents d'autorité*: the first, because 'they are the champions of the republican public authority, by their work of education itself, because this education should be civic'; the second because one must think of 'all that is confided to the postal service; for the probity, the devotion, the faithfulness which the Service demands and the police-interest, on which the confidence of the public should be neither betrayed nor shaken'; and the third, because one must remember 'the occult but real administration exercised by them'.[2]

We shall, in the conclusions which follow this discussion, analyse more clearly than has yet been convenient what it is in the public service which differentiates it from private or 'free' services (though, in fact, *no* industry is free in the modern State), and what therefore distinguishes the civil servant from the private servant.

Germany. France has had the longest history of this question;

[1] Op. cit., pp. 181, 182.

[2] Cf. Hauriou, Note in Sirey, 1907, III. 49; *Droit Administratif*, 3rd Edn., 685, note.

the history of the problem in Germany has been shorter, and the solution more rational than in France. The present law is regulated by the Reich Constitution of 11 August 1919, and the various State constitutions which came into being about that time. These constitutions contained clauses giving freedom of association to all citizens (before the War the law was in a very anomalous state regarding Trade Unions) and including in these guarantees the right of Civil Servants to associate. The Reich Constitution contains two clauses relating to this question. The first is Article 130, which says, 'All officials are guaranteed the freedom of their political opinion and freedom of association (*Vereinigungsfreiheit*).' And Article 150 says: 'Freedom of association for the protection and promotion of working and economic conditions is guaranteed to every one of all professions.' Similar clauses are to be found in other constitutions. It will be noticed that the clauses we have reproduced do not contain any mention of the word 'strike'. This issue was indeed avoided deliberately by those who drew up these clauses, *and for both civil servants and private workers social control over the right to strike was left to particular laws and regulations.* During the revolutionary months the tendency was to interpret these clauses as containing the right to strike, at least members of the Extreme Left and many officials represented and urged this interpretation; but the consolidation of the republic and the rebuilding of social order resulted in the denial of this right. The upshot is that the Civil Servants have a constitutionally-secured right of association which is worked out in most beneficial institutions, but very definitely no right to strike. We shall now retrace our steps, and return to the condition of affairs before the Revolution, describe the theories then adumbrated and on the whole generally accepted, and then analyse the effects of the Revolutionary and post-Revolutionary events, which led ultimately to the denial of the right to strike.

Before the War Germany was blithely unconscious of the problem of the right of association; at least there was no ground for anxiety. The social situation of the Civil Service at that time, and the legal condition reflecting it, is well summed up by a famous jurist.[1]

'The obligation of public service differs from other relationships of obligation by the *oath of service* which must be taken by the servant and which is combined with the commencement of activities. This oath is variously formulated but contains substantially the same promise faithfully to carry out the duty with which the taker of the oath is obligated. The purpose of the oath is to strengthen the ethical element contained in the public obligation to serve, by invoking the conscience and the awe of God, since the ethical element is not completely tangible in law. The Civil Servant is, however, legally bound to take this oath. Thus we are again concerned with a legal characteristic of official obligation which arises out of that ethical element. And it is indif-

[1] Otto Mayer, *Deutsches Verwaltungsrecht* (2nd Edn.), 1917, II, 245.

ferent what kind of subject the official obligation may be. Military leaders can be provided with a specially hired following by a private law contract; they can be helped by a peasant whose horses have been commandeered for the public transport; they can also be provided with a military waggoner: the last alone fulfils a sworn duty which under circumstances demands from him for the same function quite a different willingness to sacrifice himself than is expected from the former two types; this measure he must himself discover from his loyalty to the Service: and just for that reason he is sworn in.'

This type of theory was general [1]; as general among the administrative and constitutional lawyers, that a right of revolution was inadmissible in a constitution. It postulated an all-powerful State, the immaculate nature of its authority, and, therefore, the subjection of the people—in this particular respect the subjection of the Civil Servant who has a special ethical relationship with the State, servant of all. There was no question of the right to strike, and this in itself was not discussed. All that was discussed, and this with question-begging business, was the subjection of the official to a code of discipline given to the law of the State and the theory of its authority under an absolutist monarchical system. If the State were absolute, how could anything be admitted to rights which took away from its absoluteness? Positive law taught this absoluteness without questioning its foundations. Therefore the question of the right to strike did not arise: though, of course, nothing could be said against societies of Civil Servants for pleasure-giving and instructive activities.

The German State could not live permanently or even long in its old mould; year by year it was battered and dented by the pressure of life and thought in the democracies around it. The Revolution merely hastened the process of dissolution. When it came the previous repression had engendered a tremendous amount of force (not calculated to be long-lived) against the old system, and the impetus of that force at first swept away more than mature consideration could, or afterwards did, justify.

Complete rights of association were promised to all, and these were held to include the right to strike.[2] A number of exceedingly well-organized associations arose, at present including practically every person in the Reich, State and Local Government services. But little by little the *unlimited* nature of the right of association was suppressed. Though it is held to have been maintained in Baden,[3] yet the proceedings of the constitutional Assembly showed strong opposition thereto. The opposition was based upon grounds with which we have by now become very familiar: 'Taking into account

[1] E.g. Laband, *Staatsrecht*, 5th Edn., I, 4, 100 and 433.

[2] Cf. Bendix, *Das Streikrecht der Beamten* (1922), pp. 5–11 (an intelligent book); Proclamation of the Council of People's Commissaries, 12 November 1918; Proclamation of Prussian Government, 13 November 1918.

[3] Op. cit., p. 16.

the pension rights accorded to them, and the general interests of the whole economic system, which must be protected, the final conclusion of the right of association, the right to strike, cannot be accorded to officials as it can to private workers.' But the phrase the *general interests of the whole economic system which needs protection* is a more enlightened line of objection than was usual in France before the War, and is prevalent even now. Another point of view,[1] the rational attitude of which is to be applauded, was: 'The official must first exhaust all possible means of conciliation (*alle Instanzen*) and must then finally have applied to Parliament, which provides the means, before he makes use of this right. Both morality and reason demand this.'[2] In Bavaria the right to strike was more explicitly denied in the constitutional discussions, and on the grounds, firstly, that this denial was a *quid pro quo* for permanence of tenure, and, secondly, that public interests came before the interests of any group.

In the Constitutional Assembly of the Reich the debates[3] at once centred round the meaning of the word 'association'. The Constitutional Committee of the Assembly dealing with what afterwards became Article 159, found itself called upon to choose either the original form of the clause written by Hugo Preusz, in which the word *Koalitionsfreiheit* was used, or some other word which would not give the impression that the right to strike was admitted. The reporter of the clause asked the Committee to take it that the original form did not touch the question of the right to strike. Whereupon an official of the Prussian Ministry of Commerce[4]:

'According to the meaning which has been previously ascribed to the word *Koalitionsfreiheit*, it is supposed to include the right to strike. Now it is suggested that the right of coalition ought not in any way to be limited. . . . That is to say, at no time, in no condition of necessity, for no class of civil society, ought it to be limited: not for railwaymen, not for those who produce the most essential articles of consumption, not for people who control gas, fire, water . . . not for agricultural workers. I don't know whether the Committee was really conscious of the full import of such a constitutional rule, and whether it really wishes to accept the responsibility for such a condition.'

The word *Vereinigungsfreiheit* was chosen instead of the other: and an important member of the Committee (Dr. Hugo Sinzheimer, a great authority on labour law) said 'we expressly declare that we do not wish to decide the question of the right to strike in the Constitution'.[5] We need to notice only that the question of words was a question of intention, and that decision as to that intention was left to other authorities; and the insistence of the Ministry of Commerce official upon the fundamental nature of certain services and the need

[1] Op. cit., p. 15.
[2] Op. cit., pp. 16–21.
[3] Cf. *Bericht und Protokoll des* 8. *Ausschusses*, No. 391, p. 389 ff.
[4] Loc. cit., p. 390.
[5] Loc. cit.

that these should not be threatened by interruption. An interpellation in the full session of the Assembly on the Civil Service generally caused a discussion of the right to strike.[1] The only ideas which we have so far not come across were the need for a *right to strike as a counterweight to the organization of other industrial and professional groups in the State*; and the difficulty of reconciling such a right with the Ministerial responsibility for the Budget.

These debates and constitutional clauses, indeed, settled very little. The Constitution, as we have seen, had in this matter abdicated its judgement; though its very abdication was a judgement: it was not positively in favour of the right to strike. The issue, indeed, was positively settled, at this time at least by events, and by the declarations of theory evoked by those events. A threatened railway strike in Prussia in the spring of 1919 drew from the Government the following decree[2]:

'The right of coalition does not justify a breach of contract. Every refusal of work without consent is therefore a breach of duty which involves legal consequences. The Government would act towards the whole nation without conscience if it conceded to officials the power of stopping State industries like the railways, and therefore do infinite damage to the whole people, whose officials ought to serve.' (Especially as the officials were so expensive in the terrible conditions of that time!) 'Indeed, the Government would be obliged to consider such a strike as a crime against the whole people at a time when the Fatherland is still threatened by foreign dangers and by the lack of food and raw stuffs. Hunger and idleness of the whole economic apparatus would be the result. . . .'

In 1920[3] the Prussian Government made quite unequivocal declarations that the right to strike did not exist; it was in fact a harking back to the pre-war theory of the matter, though, as we shall see, it was more society's welfare than the Government's welfare that was called to witness.

'The so-called right to strike has no inseparable connexion with the conception of the right of coalition. The strike is only one of the means, and not the sole one, through which one can attempt to attain better economic conditions. Whether *this* means shall be used is to be decided by the mutually obliging rights and duties which were included in the condition of officialdom. If the concerted stoppage of work is not compatible therewith, then the so-called right to strike is not given with the right of coalition. In its application to Civil Service conditions these principles lead to the conclusion that the Civil Servant must not strike. The Civil Service status is a status of loyalty. *As the State could not conduct an ordered life and could in no wise express its will, it must enter into a relationship with the Civil Servant which obliges the latter to a complete devotion to the State.* This condition of loyalty also appears from the fact that the official takes an oath of service. The special character of the official's status is expressed in important conditions of Civil Service law. With

[1] Heilfron, op. cit., Vol. 7. p. 459 ff.
[2] Cited Bendix, p. 38. I give only the essential parts.
[3] 20 February 1920, Prussian Landtag.

due regard to the duties towards the community imposed upon him, the right is denied to the official capriciously to leave his work. For this reason also are the majority appointed for life and made dismissible only by means of statutorily regulated disciplinary procedure. Further, the rights of officials to specified salary, half-pay and pensions for dependents, are legally regulated and are specially guaranteed by the Reich Constitution. In this specially formed relationship of rights and duties, the Civil Servant who strikes, at once breaks his oath and violates the official obligation he undertook. The strike is an unpardonable truancy from work and its consequence is that the servant, during the time of the strike, loses his pay and must expect formal disciplinary procedure against him with the purpose of dismissal. By this none of the great interests of the Civil Servants is violated, because at their disposal are other means of making their views valid than the strike. Since the representative assemblies of the States have a far-reaching right of controlling their executives, as the representative councils have on local government, the official has a specially influential instrument to get his demands satisfied by their help. The opinion of the Prussian Government in this matter is identical with that of the Reich Government, etc.'

This clear and well-founded statement became the basis and model of all future development, and similar declarations were issued when strikes threatened, and when they came, as in January and February, 1922, during the great railway strike.[1] This, then, is the situation, and the disciplinary courts have maintained a similar attitude. The duties of the officials, which we discussed in a previous section, as stated in the *Reichsbeamtengesetz* of 1873, the various State Civil Service Laws, and Departmental regulations, limit the constitutional right to strike.[2]

In a case before the Reich Disciplinary Court in 1922 [3] the law was carefully analysed and stated. The blunt purport is that there is no right to strike, there are many laws and regulations against it, most derived from the pre-Revolutionary period, and none in its favour whether made before or after 1918. But the social doctrine of the Court is of more importance to us than the mere judgement.

'Without such a strict attachment to the State, to which, on the other side, corresponds the guarantee of a secure position calculated for permanency, and a special protection in the exercise of official functions, *the State would not be able to fulfil its functions. It must be able to rely upon its officials being permanently at its disposal to undertake the State's administrative business.* With this legal peculiarity of the official's status any refusal or stoppage of work depending upon the good will of the individual official is completely incompatible. The freedom to strike would stand in contradiction to *their obligation, grounded in their very appointment, continuously to carry on their services for the welfare of the community within the measure of the office they occupy. Officials are servants of the community* (Article 130 of the Reich Constitution), *and therefore subordinate to it. They must not as bearers of the authority of the State counteract the will*

[1] Bendix, p. 46 ff., and Appendix, for declarations of Government and associations.
[2] Brand, op. cit., Sections 159 and 159A; also Anschutz, *Kommentar* to Art. 159. Cf. also Nipperdey, op. cit., Vol. II, Article 159.
[3] Cf. Report, No. 24, Schulze-Simons, p. 73. Decision, 14 December 1922.

of the people as it is expressed through constitutional organs (Articles 1 and 5, Reich Constitution), *by hindering the fulfilment of the duties of the State by the refusal of their services.* Otherwise the authority of the State would fall into *complete dependence upon Civil Service associations.* The situation of a Civil Servant of the Reich is not different in the State based upon a republican democratic constitution from what it was in the previously existing State.'

Survey, and comparison with Great Britain. Thus a State at a juncture of history when it was more than usually highly conscious of the nature of its behaviour definitely refused the right to strike. The grounds, when we sum them up, were, broadly, three : (*a*) if the State engages itself to give certain benefits to its Civil Servants, and by its institutions and traditions substantiates its engagement, it may as a matter of a fair bargain require a corresponding guarantee that it will not be subjected to the inconvenience, at the minimum, of a strike ; (*b*) the interests which the State has in the continuous operation of its services are of an urgent, life-and-death nature (remember the examples given !—gas, fire and water, and so on), and these must not be stopped lest a great calamity befall it ; and (*c*) if the demands of Civil Servants are given ample constitutional channels in which to find their vent, and, if just, their satisfaction, the strike must be relinquished as a means of forcing the State to surrender. In our opinion the problem is substantially solved in these three propositions. We have already, in treating of France, expanded upon the first proposition. The rest of society is burdened with the provision of the officials' total remuneration, it cannot produce this without the security and steady continuation of all fundamental services, and therefore if it accepts the continuity of the burden, it not only *ought to have* (as a matter of everyday ethics) a *quid pro quo* in the matter of continuity of service ; but it *must* have this, or else the source of its ability to pay the remuneration is gone. The moral claim is grounded in the economy of Nature.

The second proposition, that the services performed by the State are so fundamental that they can on no account be allowed to cease, is of basic importance. It is indeed the root and centre of the whole case against the right to strike ; and this it is which frightens people even against the right of association. This fear is simply preconsciousness of danger to society of any interruption of the eternal round of industry. An analysis of the industrial and commercial life of any modern State shows that this fear is only too well justified, in the measure in which we grant that bread is better than liberty. The life of modern society is highly organized. Few activities are undertaken for the direct satisfaction of those who do them the vast majority of commodities and services are produced for others than the producer. A delicate counterpoise of freedom and subordination of the myriad elements alive in society has been created as the necessary

basis of social production and consumption. Most of the satisfactions of life have at least a particle of economic welfare allied with them, sometimes as the end and purpose of the satisfaction, sometimes as instrumental to a largely spiritual satisfaction. And the mass and quality of things done, thought and consumed which make up modern civilization are vitally dependent upon its high material welfare. Without this there would be neither means, nor leisure to enjoy the means, and all the conditions of work and worship would assume another aspect. Whether that aspect would be more pleasing to any particular individual among us or not it is immaterial to discuss here. It is enough if we can admit that it would be otherwise. But we have everyday proof that the mass of mankind do not want it otherwise, and the plans of social regeneration made by the great leaders of thought are rarely based upon a reduction of the amount of wealth, but most frequently postulate consciously or unconsciously an increase in the riches of the world. Its true nature is disguised in the modern god, 'The High Standard of Living.' This indispensable standard of living cannot be produced otherwise than by two main institutions: subdivision of labour, and credit.[1] The first produces a number of independent, specialized and wellnigh non-versatile economic groups; the finished product of each is the raw material of the other, and the sectional services must be combined to attain any utility to a consumer. All economies, that is, the minimization of effort with the maximization of gain, are derived from the regular, steady, punctual and exact co-operation of otherwise unrelated multitudes, information about the market, transport, command of raw materials and labour long before the product can be consumed, and all the machinery of exchange is needed to help this method of indirect production at the highest pitch of efficiency. Everything, down to eighths, even thirty-seconds of pennies must be calculated, anticipated and weighed up when supply and demand are being adjusted to one another. And the months and the years in which deliveries and payments are due are assumed, by operations in which people place confidence, to be here already. Time, which is mathematically-calculated interruption, has been abolished by the economic need for continuity; continuity would be abolished by interruption, if it returned unexpectedly. Not one of the innumerable factors in the calculation may be changed by an undue stoppage in its predicted orbit upon which so many other revolutions depend. A strike in one industry of importance may do grievous harm to the life of other parts of the community, who, so far from being immediate parties to the dispute, do not even know what it is about. The State is therefore compelled to demand the continuous fulfilment of social expectations. Who compels it? Society. We have reached a stage in the life of the State where even the dissidents

[1] *Cf. Chap. II, Politics and Economics.*

and the wellnigh irreconcilables conduct their coercive (defensive or aggressive) campaigns with order and regard for the basic necessities of life. The German railwaymen were at pains to transport milk; the English coal-miners would not let the mines get flooded; and in the English General Strike of May, 1926, the Trade Union organizations issued directions and made arrangements for the proper conduct of the nation's vital necessaries.[1]

Now, in proportion as the services are vital to social existence obedience to the State must be unconditional. Of such a character are the public services. Communications, revenue, health, the ordering of trade and industry and their various processes, which secure conditions of justice and physical health for the weaker members of society, and prevent, at least in part, waste and tyranny, the care of the poor, the widow and the orphan—our prudence and compassion have declared these things to be so urgent and vital, that we will not have any but the State to administer them. In proportion as we do not admit that these can be given up we are driven to demand their continuity, that is, to forbid any right to strike; or to place this right under such restrictions that it loses its original meaning and force.

What is Public, what is Private, Service? Now it may be said that all this proves nothing in particular about the *public* services. Does not the analysis we have made lead us to the conclusion that *all* great services whether in private or in public hands should be forbidden to strike, or allowed to strike only under very limiting conditions? Such a conjecture is made already by Harmignie in the course of his discussion of French Civil Service Associations.[2]

'It is objected', he says, 'that the interdiction of the right to strike ought then to be extended to workers of the railway companies and of all services the monopoly of which is a concession and which are of public utility, as lighting, for example. We agree; it is necessary assuredly to take special legislative measures concerning the workers of these enterprises and to forbid them, under severe penalties, to suspend their work.'

In most countries some limitations had already been established before the War. Apart from countries where a sheer authoritarian attitude was taken up by the Government, as in Rumania and Bulgaria, limitations were strict, and even stricter than in these countries, were the rules in great modern democracies like Australia and New Zealand. The State had in Australia and New Zealand come to mean so much to the ordinary man, to give him so many

[1] Cf. The General Strike Order, T.U.C. Memorandum, given as document No. 72 in Page Arnot's *The General Strike*, 1926, p. 160 ff.

[2] Op. cit., p. 329.

rights that these could not be maintained without corresponding obligations, *for the obligations were part of the energy which produced the resources out of which rights were distributed.* Therefore those countries placed all industry under a régime which put off the right to strike until the time when human reason had accomplished all it could.[1] Courts of Conciliation and Arbitration were established, principles of a 'living wage' were adopted, and strikes and lock-outs, in private as well as the public services, made illegal. It is not necessary to describe the machinery here. The motive is our concern, and its character leaps to the eye. It is quite clear that economic and other benefits are created by labour, capital and organization: if these stop, the benefits cease; and the more carefully organized and planned benefits are, the more indispensable is the continued work of its creators. The whole recent tendency of trade union legislation in Great Britain has been towards the limitation of the power to strike. But we have already insisted upon the meaning of these developments earlier in the work.

Naturally the State has first taken steps where it could most easily take them, namely, in relation to the officials in its own immediate service, but the doctrine which it has propounded refers to many private industries too. In Great Britain the subject attained little prominence until the General Strike of 1926. Up to that time there had been an extensive growth of Civil Service associations which had met with no obstacle set up by the Government. Very little, if any, discussion had taken place about the right to strike. No law forbade any Civil Service association to come into being, or if it was established, to affiliate with outside bodies.[2] For the predominant purpose of Engli statesmen has been liberty rather than security and order.

The grades of the Service below the administrative have for long felt a certain sympathy with the Liberal and Labour movements. The theory of the Treasury in regard to pay and conditions in the Civil Service is that they ought not to be more than that given by any employer outside the Service. Therefore it was and is to the interest of the Associations within the Service to co-operate with the Trade Unions outside to raise the general rate of wages and improve the conditions of labour. Further, the Service Associations recognize the fraternal duty of uniting with other Labour forces to increase their strength and give them aid in overcoming the hurtful qualities of the present organization of industry and commerce and society. There-

[1] Cf. Chap. II, Politics and Economics; cf. also these references, Rankin, *Arbitration and Conciliation in Australia and New Zealand*, 1916; Wages Boards and Industrial Conciliation and Arbitration Courts of New Zealand, Cmd. 4167, 1908. Heaton, *Modern Economic History*

[2] Cf. Bernard Leger, *Les syndicats des fonctionnaires en Angleterre* (1929); cf. also H. G. Swift, *History of Postal Agitation*, 1900.

fore the Associations grew[1] and they affiliated to the Labour Party and the Trade Union Congress. Not sympathetic to, and self-excluded from such affiliation, were the top 20,000 of the administrative, upper clerical, technical and legal staffs. The division between these and the subordinate and manipulative grades is one between those who are in positions of command and those who take orders. Those who take orders are, in the mass, allied with the Labour movement; the rest are, on the whole, satisfied with the State as it is, and are sufficiently well off not to feel the spur to join the party of criticism and reconstruction.

Before 1926 affiliation had raised no great controversy, though the affiliating associations were conscious of their peculiar situation - servants of the State yet allied with a party whose intention it is fundamentally to alter the nature of that State. The question had also been raised by the Royal Commission on the Civil Service of 1914, but this body only described the nature of the problem and its difficulty, and recommended a special inquiry, the scope and nature of which it carefully defined.[2] No such inquiry was ever held, and the issue was forcibly impressed upon the public attention during the strike of 1926. The State, it was said in popular discussion, could not be sure of the uninterrupted service of those who belong to affiliated associations, since they are liable to be recommended to go on strike at any moment. The State had the right to expect members of the Civil Service to volunteer for any duties consequent upon the emergency. Civil Servants enjoyed the special advantage of being a 'sheltered' occupation, and the price of this was political neutrality. Against this view the attitude of the Civil Service Associations was well stated in the ballot paper issued to members of the Civil Service Clerical Association, which, finding many dissentients in its ranks, took a referendum on the question.

1. The Association admitted affiliation, but denied that it was obliged to go on strike at the request of other labour organizations.

2. 'As regards the position of Civil Servants as servants of the State, there is no necessary inconsistency between Civil Servants

[1] For their present numbers and constitution, cf. Statements submitted to the Royal Commission by the Civil Service Clerical Association, the Society of Civil Servants, the First Division, etc.

[2] *Macdonnell Commission*, 4th Report, pp. 99 and 100. 'The subject-matter of the inquiry should include the following questions: (1) Should the principle of "recognition of association" be carried further in the Public Service, and if so, in what form? (2) Should the methods and organization of Trade Unions exist in the Public Service, and if so, to what extent? (3) Should conciliation boards be set up in the Civil Service, and if so, how should they be constituted? (4) Should any restrictions be imposed on the action of members of the Civil Service in respect of the withdrawal of their labour without due notice? (5) Should associations of Civil Servants be at liberty to join with outside Trade Unions? (6) Should associations of Civil Servants be at liberty to affiliate themselves to political parties and promote candidatures at elections?'

doing their work faithfully and well, and yet at the same time being federated with other bodies of wage-earners, through the Trade Union Congress, for the protection of their wage interest.'

3. The third and final proposition raised by this problem is: If the demands of Civil Servants are given ample constitutional channels in which to find their vent, and satisfaction when found to be just, the strike must be relinquished as a means of forcing the State to surrender.

The issue was decided in a state of public temper rare in Great Britain. The Trade Unions were beaten until they were dazed, and Parliament, which had several times in the past few years been unable to find time to deal with a Trade Union Bill to limit the political and industrial powers of the Unions, attacked the new and steaming dish with a really unwonted gusto.[1] The result was the Trade Union Act of 1927, Clause 5 of which relates to Civil Servants[2]:

'prohibiting established Civil Servants from being members, delegates, or representatives of any organization of which the primary object is to influence or affect the remuneration and conditions of employment of its members, unless the organization is an organization of which the membership is confined to persons employed by or under the Crown and is an organization . . . in all respects independent of and not affiliated to, any such organization as aforesaid the membership of which is not confined to persons employed by or under the Crown or any federation comprising such organizations, that its objects do not include political objects, and that it is not associated directly or indirectly with any political party or organization'. . . .

We have already discussed the effects of a strike, should it come, upon economic and social life. But it could yet be argued by Civil Service Associations that these would not necessarily be suffered, since the strike was a very remote contingency, and therefore no Government ought to establish a restraint. But, indeed, the question is not merely one to be determined by the probability of the event; but of the omnipresence of a threat. The right to strike is no positive guarantee: it is the residue of the individual claim and even legal right to freedom of opinion and person. The right to strike is a result of the State's non-interference with the right to freedom of person. But when the State does not interdict, the result is, when men act in association, the feeling that an ultimate coercive power exists, a positive weapon. The possession of this weapon acts psychologically upon its possessors: it increases their will, as well as their power, to resist. It offers an alternative to negotiation with the good will of the other party. This brusqueness may jeopardize the public

[1] Cf. Mr. Churchill's answer to a deputation of the Civil Service Civil Rights Defence Committee, representing all the affiliated Unions (1 March 1927), reproduced in *The Post* (organ of the Union of Post Office Workers) for 9 April 1927.

[2] Sect. 5, Sub-Sect. 1 only is reproduced. The whole of the clause should be studied. Cf. also Statutory Rules and Orders, 1927, No. 800.

welfare; and it is the fear of this which is expressed by the opponents of the right to strike. Its legal acknowledgement may deliver over events to passion before all the devices of reason are exhausted. Yet its non-existence may also set up against the guardians of public order so little resistance that they will act ignorantly, passionately, on private or class motives, and slur over the justice of Civil Servants' claims upon the public.

Constraint put upon Civil Servants, therefore, cannot permanently operate unless the State admits constraints upon itself, or to speak less abstractly, unless the people and Parliament establish machinery which will control and at need coerce Ministers, Treasuries, and heads of Departments to the end that they may act justly. For as it has been said, the strike is not a right, it is a fact,[1] and 'the right to strike is not one to be asked for, it must be taken!'[2] The whole of citizenship may be summed up in the phrase, organized mutual self-restraint. If this does not exist, strikes will come, right or no right. So that the strike being excluded, what are its indispensable substitutes? They are (1) institutions, in which Civil Servants can obtain a full and proper hearing, and in which their legitimate grievances can find redress, and (2) public recognition that the authority of the people, of Parliament, and Ministers, has moral bounds, in that it must be willing to temper the doctrines of Treasury control and economy—both potential fetishes—with justice to officials. The second is the fundamental necessity, and the extent to which the machinery is already operative in various States will be discussed later. As the Civil Service is expected to subject itself to the community, so is the community obliged to subject itself to the Civil Service. Enlightened nations have already made arrangements to guarantee this, while others still persist in the true belief that, for a time at least, exploitation is possible, and the untrue belief that discontent suppressed is discontent dissipated.

One question must yet engage our attention before we pass to a description of the machinery of representation and conference. How far is affiliation permitted? It is fully permitted in Germany, it is not permitted in France and Great Britain, it is not denied in the U.S.A.[3] In Germany the situation is settled by the Constitution which allows free rights of association (Articles 130 and 159). The only limitation upon the use of the associations for party political purposes

[1] Lefas, *L'État et les fonctionnaires*, p. 199. [2] Harmignie, op. cit., p. 118.

[3] Nor is there a general denial of the right to strike. But for postal servants the right to affiliate with non-Civil Service organizations is *admitted* by an Act of 24 August 1912, but provided that such organizations do not impose upon them 'an obligation or duty to engage them in strike or proposing to assist them in any strike against the United States'. Hence affiliation with the American Federation of Labor is not denied to these officials; and it is said that generally the rule holds for any Civil Servant. Cf. Mayer, Chap. XVI.

is the disciplinary rule which regulates political activity. One great association is affiliated to the great free Trade Union organization: the *Allgemeine Deutsche Gewerkschaftsbund*—the British equivalent of which is the Trade Union Congress. This is the *Allgemeine Deutsche Beamtenbund*. The other associations as such are politically neutral.

The solution in Great Britain has been dictated by hot-tempered rage and at least a suspicion of class hatred. In 1914, the Royal Commission on the Civil Service remarked that—

'The difficulty is confined to political action alone. So long as an Association limits itself to Service action, no one expects that any restriction should be placed on its activities. But when an Association becomes affiliated to some political organization connected with a parliamentary party, different questions arise.'

The Commission offered no solution; events have recently determined this, and the power now exercisable by the dis-affiliated associations is only as much as the Government thinks it right for them to have. I myself can see little harm in leaving the question of affiliation entirely to the Civil Service associations.

[3] Cf. Para. 19, 1st Report, Dardanelles Commission (Cd 8490; 1917): 'It is the duty of the official not to resign but to state fully to the head of his department and, should any proper occasion arise, to other members of the Ministry, what are (*sic*) the nature of his views. Then, if after due consideration those views are overruled, he should do his best to carry out the policy of the Government, even although he may not be in personal agreement with it. . . .' Undue loyalty 'would tend to cripple independence of thought', and 'would leave the Parliamentary heads of the various departments without that healthy assistance which they have a right to expect, and which is, at times, much more likely to be rendered by reasonable and deferential opposition than by mere agreement resting wholly on the ties of discipline.'

CHAPTER XXXV

REDRESS OF GRIEVANCES, AND THE GUARANTEE OF RIGHTS

THE machinery whereby Civil Servants can make their complaints heard and secure a redress of their grievances is broadly four-fold: the national and local representative assemblies and the Treasury (or Ministry of Finance); special representative councils like the Whitley Councils in England or the Officials' Representative Councils in Germany; courts of arbitration after the model of the Industrial and Wages Courts for private industry; and formal arrangements with procedure of a judicial nature for the prosecution of established rights and the challenge of disciplinary sentences.

PARLIAMENTS AS MEDIATORS

Parliaments mediate between the Civil Service and the taxpayer. History shows that they are not liberal towards the Civil Service, but rather the reverse. The total number of Civil Servant voters outside a few constituencies is not large enough to weigh with the member of Parliament, and though members have in the past complained about pressure upon them, the community as a whole outweighs the Civil Service overwhelmingly. It is to the interest of the member of Parliament, in every country, to act in such wise that he and his agents can truthfully tell his constituency that he has been a champion of economy. For economy is an affair of pounds sterling and numbers of Civil Servants; and both of these are meaningless abstractions to the ordinary voter, who lets himself be gulled into believing that they really mean something because he has an inculcated resentment against officials, and this adroitly played upon by his member who, as he says after the meeting, 'pulls it off', and an innate love of money which is wasted when used by any one but himself, for himself. No Parliament has ever shown spontaneous generosity to Civil Servants. The atmosphere is one rather of repressiveness. Civil Servants' salaries are easily accessible to economizing governments, and their professional ethics leave them defenceless against a barbarian public. In Great Britain there are many occasions when Civil Service conditions may be discussed before the House of Commons, but only a critical

situation, like the Gregory case, or rank injustice when it has been tactlessly committed as in the case of the dismissal of hundreds of ex-Service men, can cause the House to turn its attention away from the more general matters of administration which are discussed during Supply debates. This is the proper procedure so far as it goes; the House of Commons confines its strictly limited time to broader matters. But Parliament has no special machinery to focus and force its deliberate and detached attention upon grievances which may seem minor to it but which are important in the eyes of Civil Servants. Parliamentary machinery failing, the mediator between Civil Service and taxpayer is the Treasury.

The Treasury has been blamed for its tight-fistedness, for its fanatical devotion to the principle that one should spend less rather than more than last year.[1] But its general arrangements, financial and otherwise, for the Civil Service, have been quite liberal compared with other countries. If there is any criticism to make of its behaviour it is that though accessible it is not easily convinced, and day by day grievances which demand adjustment of pay and conditions which are fairly promptly made in private industry are met by it in a spirit of authority, churlishness and unreasonable negation. All sorts of clerical labour, negotiations, and nerve-racking advocacy before the Chancellor and Parliament are staved off if a demand is promptly quashed, and this labour-saving desire is reinforced by the 'Treasury tradition' of tight purse-strings. Perhaps the developments of the years since 1919 may ultimately make the Treasury more amenable to the just demands of the Servants. The institution of the Establishments Division in the Treasury and of special Establishment officers and divisions in the Department may enrich the Treasury's understanding of staff questions,[2] and understanding may generate an unprompted will to give a ready ear to complaints and an unforced will to remedy them. It cannot be denied that the Treasury still needs an impetus from the outside, and the Civil Servants a powerful means of advocacy, to secure a proper sensitiveness to staff questions.

The situation in Great Britain is, however, better than it is in France. There the Ministry of Finance is overshadowed by the Parliamentary Commissions of the Budget (and their sub-committees) and neither the Chambers nor the Commissions have shown any tenderness of regard for the Civil Service. Problems of staffing, bonus and pay have been met with feebleness, chicanery, illwill, ignorance, and self-seeking meanness and shuffling, everything, indeed, except wisdom and social spirit. Extraordinary occasions like a

[1] Cf. Machinery of Government Report, 1915, pp. 17–21.

[2] Cf. description of this in Evidence of Russell Scott, *Royal Commission C.S.*, 1929, Minutes, Vol. I, and Warren Fisher, ibid., pp. 1278 ff.

strike or a European war do, however, cause the Government and the Chambers to undertake reforms and even to produce some amelioration.[1] Yet Civil Servants have not such potent means continuously at their disposal. Nor have they the power to invoke the aid of Parliament by petitions exposing the policy of the Executive in their regard. This privilege which the Constitution of 1875 passed over in silence is a 'natural right' for ordinary citizens, but the Chambers have not censured the Government which suppressed it for officials.[2] Though there are Civil Servants sitting in Parliament the situation of the whole body is not thereby improved to any degree worth mention. The Civil Service is, indeed, compelled to conduct active practical campaigns, especially during elections, to secure attention to its demands. *The Comité d'action des fonctionnaires* realizes that it has something to hope only from a reinforcement of the authority of the Executive and administrative reorganization, for 'the increases in pay offered by various political parties, more avid for our votes than concerned for the national prosperity would be only a provisional palliative. . . .'[3] The great *Fédération des Syndicats de fonctionnaires* (formerly adherent to the C.G.T.) has black-lists of deputies who do not support Civil Servants' demands, and these names are communicated to the groups in the constituencies. Questionnaires demanding engagements on the part of these and other candidates are distributed. The Federation in a resolution of its Congress of 1924 said:

'It knows that it can count upon the absolute devotion of all its fighters to whom will fall the task of a giving to this organization the necessary vitality to cause to triumph at the elections not any particular party, *but a current of opinion strong enough to combat the present influence of the great economic groups* and to facilitate the evolution of syndicalism.'[4]

The Congress of the U.S.A. is not an open-minded court of appeal for Civil Servants. There is an exceptionally strong mistrust of the executive authority and an extraordinary feeling against bureaucracy. It has been possible for Civil Servants to 'get at' Congressmen and

[1] Cf. Cahen-Salvador, *La situation matérielle et morale des fonctionnaires*, Revue Politique et Parlementaire, 18 December 1926; and Boissard, *Le Statut des fonctionnaires*, in *Politique*, 15 February 1927; cf. the work of the Commission Villeneuve, 1919; Commission Trépont, 1925.

[2] In the Chamber of Deputies, 7 June 1879, the Minister of the Interior quoted a former declaration with approval: 'It is evident (*sic*, everything is evident to a Minister) that for every representative or delegate of the central authority it is an imperious duty of his position, and I may say conscience, to maintain an extreme reserve regarding actions against the sovereign authority, even when they take the mildest and most inoffensive form.' The Chamber of Deputies voted the resolution that the right of petition is above challenge, *but* that all depositories of public authority ought to be severely forbidden from participating in any agitation against the Government of the Republic. Cf. Pierre, op. cit., Edn. 5, Sect. 573.

[3] Cf. Journal des débats, 1924.

[4] Cf. Carrère et Bourgin, *Partis Politiques*, p. 253.

Congressional Committees because of their backstairs organization. The virtue of this system from the standpoint of the Civil Service, accessibility, is offset by the great drawback of the sporadic, haphazard, unsettled and partial nature of such solutions. There is no substantial or continuous guarantee in such machinery. The Treasury has until quite recently been ineffective, it can even be said impotent, in the matter of Departmental appropriations; and the available evidence shows that, even after the reform of 1920, it still lacks power, and is not to be compared with the British Treasury for either the scope of its authority or its energy and traditions. The development threatened by the attempts made at the beginning of the twentieth century to influence Congress by collective action was baulked by executive orders. Employees were prohibited from communicating with Congressmen and Congressional Committees on matters of legislation or appropriation or for Congressional action of any kind, except with the consent and knowledge of the head of the department.[1] All this pertained from 1902 until 1912. From 1912 liberalizing influences have been at work. In the latter year it was provided that communications between employees and Congress which could only proceed through the head of the department, and which therefore were rarely made in this way, 'shall be transmitted through heads of their respective departments or offices, who shall forward them without delay with such comment as they may deem requisite in the public interest.' This attempt to be fair to both sides, employees and head of department, made it even more awkward for the employees to express their grievances, for what would the head of the department do, in his statement to Congress, and in his departmental commandments, if the demands opposed his views or the views of his representatives? An occult movement secured the passage for the Act of August, 1912, which provided that

'the right of persons employed in the Civil Service of the United States, either individually or collectively, to petition Congress or any member thereof or to

[1] *Executive Order (Roosevelt), 31 January 1902, forbade all officers and employees* 'either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interests, any other legislation whatever, either before Congress or its Committees or in any way save through the heads of departments under or in which they serve, on penalty of dismissal from the Government service'.

The Order of 26 November 1908 went even further: 'No bureau office, or division chief or subordinate in any department of the Government, and no officer of the army or navy or marine corps stationed in Washington, shall apply to either House of Congress, or to any Committee of either House of Congress, or to any member of Congress, for legislation, or for appropriations, or for congressional action of any kind, except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress, except through, or authorized by, the head of his department.' See Mayer, *The Federal Service*, p. 548 ff.

furnish information to either House of Congress or to any committee thereof, shall not be denied or interfered with'.[1]

This gave rein to the attempts at organization, and from 1916 the National Federation of Federal Employees has been able to exercise great influence upon Congress. The statutes creating the Reclassification Commission and the retirement system (1920 and 1922 respectively) were due in large measure to the activity of this organization, the latter statute being especially the result of the clever application of the strength of the employees' organizations. That strength is reinforced to a tremendous degree by the electoral power of the American Federation of Labor to which it is affiliated. Any examination of the Retirement Act, which is over-favourable to Civil Servants, will show that it was no idle boast of the President of the National Federation when he said prior to its passage that

'in Congress, where two years ago a favoured road to cheap popularity was sarcasm at the expense of the Government employee, the few members who now indulge such tactics are ridiculed by their fellow-members and repudiated by their political parties. The Federation's requests are listened to and its support is sought by members of Congress as a political asset'.[2]

Perhaps the American organizations have undue power. If it is so, and we incline to the belief that they have, it is the result of two causes The first is the susceptibility to electoral intimidation of the average Congressman. Office is of more worth than the public weal. Secondly, under the present constitution of society, the A.F.O.L. is inclined to favour the demands of its affiliated organizations whether they are substantially just or not. For the benefits it helps them to acquire come from a vast amorphous body called variously Capitalist Society, the State, the Government, Congress. The burden cannot directly be shown to bear hardly upon the other groups of tax-paying workers. In a society where all live by snatching it becomes just to snatch an otherwise unjust amount from those who have already snatched most. That is partly the spirit in which demands are made and electoral battles fought. The employees have been forced into this attitude by the inertia, ignorance and incompetence of Congress. Before the organizations came the employees suffered and had no convenient means of redress. If the Civil Service and the public at large must continue to depend upon the joint efforts of Congress and the Civil Service associations acting electorally, both will continue to be alternately the conqueror and the conquered, and peace as well as war will involve the undue suffering of the one and the other.

We have seen that in Germany one of the defences against the right to strike was the alleged existence of ample other means for the redress of grievances. And, indeed, there is much solidity in this

[1] 37 Stat. 583. Cf. Mayer, op. cit., p. 549. [2] Mayer, p. 554.

defence. Apart from the fact that Civil Servants have direct representation in the Reichstag and the State Parliaments, and recognized organizations, the Parliaments themselves are organized to give the Civil Service easy and prompt access to them. In the Reichstag the 14th Committee (Affairs relating to Civil Servants) discusses, and settles the main lines and the details of Civil Service questions and laws, before they go before the full House. It consists of twenty-seven members taken from all parties in the House roughly in proportion to their strength, although the smaller parties cannot but be over-represented. It is a hard-working, a very effective Committee, and much better adapted to deal with the departmental representatives and the necessary detail of the subject than the full Assembly. The permanence of the Committee, its smallness, its special field, all offer to both the public and the officials a rational consideration of their respective claims, although higher administrative officials, members of the Reichstag and academic observers, argue that the Civil Servants exercise, perhaps, undue power. In the Prussian Diet there is the Standing Committee on Civil Servants' Affairs with about thirty members chosen on a party basis. But here the members of the respective parties are chosen vocationally—i.e. from the members of the party who are officials in the public services, and employees in private concerns like banks, commercial houses, newspaper offices. The most diverse classes of Civil Servants appear on this Committee, from University teachers and pastors to subordinate postal assistants. Civil Servants, further, have representation in the *Reichswirtschaftsrat*. These Committees have, of course, a particularly large and important field of activity at the time of the annual Budget when adjustments of salaries, additions for residence, pension arrangements, arise for discussion.

As important, if not more important, is the spirit in which these bodies and the Parliamentary assemblies work. They do take the Civil Service seriously, as an important constitutional part of the State, to be tended and safeguarded equally with any of the other institutions which are prescribed and guaranteed in the Constitution. This is partly a heritage of the absolute State, but whether the recognition lies in the nature of the people, or whether long years of experience have taught the lesson, it is certain that the value of good government is recognized, and, almost, the necessity of paying for it. Therefore the Ministries of Finance and the Interior working with these Committees and Parliament do not long deny the adjustments urged by the associations and examined and approved by themselves. This is reinforced by the right of petition which Civil Servants, individually or in association, can, like all other citizens, exercise.[1] The petition may relate to economic or other conditions. Yet neither organized

[1] Constitution, Art. 126; Prussian Constitution, Art. 27.

agitation against the Government, nor petitions relating to pending disciplinary investigations or proceedings, are admissible. Parliament has the right to use the material and information derived from its discussion as a basis for proposals of amelioration. The special value of the petition is that it gets discussed by the Committee on Petitions and the representatives of the Government who appear before it.[1] The ugly aspects of French and American Parliamentary life are not present to force the associations to undue political interference, nor is the stiff attitude characteristic of the British Treasury modified by proper Parliamentary organization. We are not arguing that the Germans are political and administrative saints: the whole judgement is relative.

REPRESENTATIVE COUNCILS

The tendency of the last decade has been for the governing body in industry, private as well as public, to create councils in which representatives of the workers have a seat, and where the demands of both sides may be candidly presented and discussed. The chief merit of this system is not that it necessarily gives the worker or Civil Servant any greater control over the conditions of his work than before, for that obviously depends upon the extent to which the employer is willing or compelled to waive the extreme use of his property rights, nor that it avoids conflict, but that it is possible for issues which rankle to secure a prompt outlet. Timely remedies may then be applied and injurious consequences reasoned over and appreciated before they come. He who hesitates is won.

In Great Britain, until 1917, individuals and associations in the Civil Service were obliged to act mainly by memorial which finally reached the Head of the Department and then the Treasury.[2] The chief disadvantage of this method was that negotiations were in writing, and personal discussion was almost entirely excluded. Anybody could memorialize a Head of the Department, but the growth of associations caused, and was partly caused by, a desire on the part of the official superiors to negotiate with a really representative body.[3] In 1917 a vast change was contemplated in private industry and this had its effect upon the Civil Service. In private industry it became evident, especially during the War, that it was not only unsatisfactory conditions of remuneration that caused industrial unrest, but a desire to be consulted about these conditions, and to learn how far orders and policy were the arbitrary expression of the employer's personal temper and how far a necessary condition of industry. In

[1] Cf. Brand, op. cit., Sect. 164.

[2] Cf. *Royal Commission C. S.*, 1929, Introductory Memoranda, pp. 70–1.

[3] In recognition of associations, cf. loc. cit., p. 72 ff. Cf. also Macdonnell Commission, 4th Report, Chap. XI.

1917 the Whitley Report on Relations between Employers and Employed was issued; it touched only the non-public industries.[1]

'To Civil Servants it came as evidence', says an association of Civil Servants, 'that the evils of the Civil Service were analogous to those of industrial organization outside, and that the new policy of a share in control . . . was in line with the policy now so influentially advocated and so warmly received in the interests of a better organization of industry generally.'[2]

From 1917, Civil Servants, therefore, pressed for the application of the Whitley proposals to the public service.

After various conferences and a campaign by Civil Service associations, and an official report, a National Provisional Joint Committee of thirty members (composed equally of official and staff sides) reported in May, 1919, on the Constitution, Objects, and Functions of a National Council and Departmental Councils for the Civil Service.[3] By the end of July, 1919, after negotiations and the Cabinet's approval, the National Council drew up a model Constitution for the departmental Whitley Councils. Generally, it was stated,

'the objects of the Council shall be to secure the greatest measure of co-operation between the administration, in its capacity as employer, and the general body of the staff in matters affecting the department, with a view to increased efficiency in the department combined with the well-being of those employed; to provide machinery for dealing with grievances, and generally to bring together the experience and different points of view of the administrative, clerical and manipulative Civil Service'.[4]

There are many Departmental Councils[5] on the model set out, with wide variations according to the peculiar circumstances of each department, and each has small numbers representing equally official and Staff sides. The National Council, which considers the interests of the Service as a whole, and to which the Departmental Councils are bound to refer general questions, is composed of fifty-four members divided equally between official and staff sides, whose representatives must be 'persons of standing (who may or may not be Civil Servants)'. It has consisted on the official side of the Permanent Secretaries of Departments or other higher officials, and since 1922 of three Members of Parliament. The Controller of the Establishment Branch of the Treasury is Chairman. The Staff side representatives must be appointed by Civil Service groups or associations[6] named in the Consti-

[1] Cmd. 8606 of 1917.

[2] Civil Service Alliance, Memorandum on Work and Policy, March, 1919.

[3] Cmd. 198; 1919. The history is briefly stated in *Royal Commission C. S.*, 1929, Introductory Memoranda, p. 82 ff.

[4] Para. 21, Constitution, National Council.

[5] In 1928 there were sixty-eight.

[6] On all constitutional questions cf. Macrae-Gibson, *The Whitley System in the Civil Service*, Fabian Society, London.

tution. About one-half the members of the Staff side of the Council have been whole-time officers of associations, the rest serving Civil Servants.

The Whitley Councils are concerned with the problems of non-industrial staffs in posts carrying remuneration only up to £700 a year.[1] The industrial staffs have special Industrial Councils.[2]

The functions of the Whitley Councils include provision of the best means for utilizing the ideas and experience of the Staff; to secure the Staff a greater share of responsibility for the determination and observance of the conditions under which they work; the determination of the general provisions governing recruitment, hours, tenure, and remuneration; encouragement of further education of Civil Servants and their training in higher administration and organization; the improvement of office machinery and organization, and the provision of opportunities for the full consideration of suggestions by the Staff on this subject; and proposed legislation so far as it has a bearing upon the position of Civil Servants in relation to their employment.

What is the authority of the Councils? In 1919 a Committee, under the Chairmanship of Sir Thomas Heath prepared and reported a scheme for the application of the Whitley system to the Administrative Departments of the Civil Service. The Committee found itself at once involved in the question we have asked. Their answer was that the Councils should be purely consultative and without executive powers. The grounds for this decision were that the heads of Government Departments were in a different situation from the managers of private business by reason of their ultimate responsibility to Parliament and therefore their lack of freedom to accept decisions of the Councils without a reservation. Since Ministerial Responsibility was an essential principle the power could not be left unreservedly in the hands of the Head of the Department; hence the freedom to accept or reject the conclusions of the Councils. Negotiation between the perturbed Staff representatives and official representatives resulted in a unanimous report which became, substantially, the Constitution of the Councils.[3] The Constitution goes beyond making the Councils merely advisory. It says that 'the decisions of the Council shall be arrived at by agreement between the two sides, shall be signed by Chairman and Vice-Chairman,[4] shall be reported to the Cabinet and thereupon shall become operative'. As for the Departmental Councils, their decisions 'shall be reported to the Head of Department and shall become operative'.[5] Does this mean that the decisions made overrule the will of the Cabinet and of individual Ministers? That is what

[1] Including scales which commence below £700 but rise above it.

[2] Cf. *Royal Commission C. S.*, 1929, Introductory Memoranda, p. 85. Cf. Report on establishment and progress of Joint Industrial Councils, 1917–22, published 1925.

[3] Cmd. 198 of 1919. [4] A member of the Staff side. [5] Clause 19.

the clauses say, quite plainly. It is obvious, however, that such an interpretation would make Ministers responsible for things in which they had not an effective ultimate critical and revisory power, and this thought caused anxiety. It meant that either the official side would run backwards and forwards to the Cabinet on each important occasion, or that it would need to take an extremely cautious, non-committal and negative attitude. Hence at the tenth meeting of the National Council a Committee was appointed to clarify this question, and it agreed upon this definition :

'The establishment of Whitley Councils cannot relieve the Government of any part of its responsibility to Parliament, and Ministers and Heads of Departments acting under the general or specific authority of Ministers, must take such action as may be required in any case in the public interest. This condition is inherent in the constitutional doctrines of Parliamentary Government and ministerial responsibility, and Ministers can neither waive nor escape it.

'It follows from this constitutional principle that, while the acceptance by the Government of the Whitley system as regards the Civil Service implies an intention to make the fullest possible use of Whitley procedure, the Government has not surrendered, and cannot surrender its liberty of action in the exercise of its authority and the discharge of its responsibilities in the public interest.'

This, if it means anything, means that a greater freedom is given to the official side, because if on consideration any agreed plan is discovered to have unexpected implications it could be overridden on the grounds of Cabinet responsibility.

However, the term that agreements become 'operative' does imply an obligation that in all normal cases they shall be operative. Certain consequences follow : the official side considers the proposals beforehand and refers, where necessary, to Ministers. In other words, the obligations of Cabinet responsibility are in normal cases exercised by an attitude assumed before negotiation. This, as in all negotiating assemblies based upon 'instructions', sometimes compels the adjournment of the discussion until fresh instructions are obtained. There is no voting : each side acts as a unit : and therefore each side must find agreement beforehand. In the background with its hands on the ultimate strings is the Treasury.

Where agreement is, for any reason, impossible, and a compromise cannot be effected, the official decision naturally holds good, and then the only benefit of the system is that the Staff's point of view, having been fully expressed in Council, and by the method of question and answer and debate, may, in time, modify the full effect of that decision. No Act of Parliament founded the Whitley system. It arose out of a promise made by the Government of the day. And whatever strength it has is drawn entirely from the needs of the public service and the character of the men and women who compose the Councils. The

arrangements and decisions made by Parliament in the ordinary course of its legislative and controlling functions sets the outside limits within which the Councils may operate; sometimes an agreement will be deprived of its force by the unintentional action of the House of Commons whose main attention may be directed to service salaries, or establishment or disestablishment of a department, division or function. These repercussions occur through the medium of the Treasury. If the House of Commons ever adopted a Committee system on the Continental model it might with advantage allow representatives of the National Whitley Council to appear before its Civil Service Committee.

Most of the Councils have done much good work in the matter of promotions, discipline, and the organization and conduct of office work; especially is this true of the departments where small devices have great value because of the largeness of the staff and the industrial nature of the work—in the Admiralty, Post Office, and the Customs and Excise Councils.

Naturally the National Council has been active on a wide scale. It has reported upon and received the reorganizations of the general *principles and methods of promotion*; a *Superannuation Committee* has codified the complex superannuation regulations; a Committee on Further Education has made its report on provision for the further education of younger Civil Servants, and lectures have been arranged by Civil Service bodies and an internal and external Diploma of Public Administration has been created in the University of London. A bonus and a sliding-scale system to meet varying price-levels have been secured, and, perhaps most important of all, the Regrading and *Reorganization of the Civil Service has been effected.*[1]

What has been gained by the institution of the Councils? Not all that was expected. The years in which the Councils were first instituted were years of world-wide hope in Reconstruction. Every belligerent country designed a special compensation for its sufferings in the War. The designs were splendid, but when related to the full extent of human inertia and love for the indulgence of the moment, fantastic and inflated. This quality mingled with the aspirations of Civil Servants. At first there was a large release of energy in the work of investigation and inventive thought, and the work of the National Council which we have indicated was most fruitful. But there has been a slowing down, a conversion of adventure into routine. However, something very important psychologically has been gained

[1] The National Council is not a Court of Appeal from the Departmental Councils (para. 37, *Report*), but certain difficulties in practice have resulted in this arrangement, that a Departmental Council may complain when a National Council agreement, administrable departmentally, is considered not to have been properly carried out and the National Council may then consider what can be done in the matter by better definition or amendment of the Service.

when there can be a semi-public review of a foolish, untactful or despotic show of authority;[1] when resentment of arbitrary interference with habit is avoided. Then, too, officials below the top grade have now a feeling that in regard to promotion, leave and other official benefits any jobbery is likely to be detected and quashed. Too much must obviously not be expected from the system by the Staff side. The official side are still, in some cases, despotic, and the Treasury, representing the Government, is too often prepared to whittle down engagements which cost money and energy. However, it is quite clear from the evidence given by Heads of Departments and representatives of the Staff, that the Departmental Councils have actually produced an invaluable and indispensable atmosphere of good and easy relationship between superiors and subordinates—*that is the universal testimony*. Different opinions are entertained of the National Council: it is alleged to be too large in size and too unregulated in procedure to do effective work; perhaps the real difficulty is that apart from occasional general reorganizations of the Service (as that of 1920) the work of the Civil Service appears rather departmental than single, national problems. It is, however, useful as a medium for the ventilation of general questions, even if nothing is to be done.

The power of the associations behind the Councils is still required to maintain real official respect for the cases they advocate, and we can surmise, though we cannot exactly count the number of, small benefits silently won without overt conflict by the mere existence of organized and recognized *vigilantes*. The evidence before the Royal Commission of 1929 shows that matters are not always discussed in the formal meetings of the Councils, but informal discussions occur between the leaders of the officials of the Staff sides, and settlements reached at once.[2]

We may pass over developments in France very rapidly, for there are so few, and the world has nothing of value to learn from them. The chief contribution of France to the development of representative Councils has been a long series of projects which have come to nothing in the Chamber and the Senate. The latest was a project introduced by M. Millerand in 1920. He had, indeed, been one of the first to see that Councils of this kind were possible alternatives to Trade Unionism and had established such a Council in the Ministry of Posts and Telephones.[3] The project of 1920 provided for the creation of an Administrative Council for each department consisting of the representatives

[1] In the Departmental Councils it is open to the Staff side to discuss any promotion when the accepted principles have been violated; disciplinary cases may also be presented for discussion if the Staff side wish it.

[2] The Report, 1931 (p. 137 ff.) suggests hardly any change, except the extension of facilities for staff representatives to carry out their functions.

[3] Cf. Lefas, op. cit. Cf. Ricard, *Droit et Jurisprudence en Matière de Postes, Télégraphes, Téléphones* (1931), Chap. VII.

of higher officials, the personnel, and people from outside the Service appointed by the Minister to represent interests or special competence. These Councils were renewable every four years and were to be at once consultative councils for all measures relating to the organization and operation of the services, departmental courts of discipline, and promotion authorities.[1] For the whole Service there was to be established a superior administrative council which would work as a kind of agency of the Prime Minister. It was to consist of an equal number of Councillors of State, Councillors of the Court of Cassation, members elected by the representatives of the Civil Servants on the departmental councils, and members from outside the service 'nominated by the Prime Minister by reason of their competence or the general interests they represent'. This council in its higher sphere was to act as a consultative body in regard to all matters affecting the good working of the services. That is all. The project was still-born. The French politician is interested in other things, while the Civil Service associations are driven into a position of syndicalist extremism.[2]

German experience has features very similar to the British: it will be recalled that Article 130 of the Constitution provides that officials shall receive representative bodies by special law. Such a law has not yet been passed, but individual Departments have established Civil Servants' Committees (*Beamtenausschusse*) temporarily to fill the gap, e.g. Ministry of Posts, Ministry of Justice and Finance Ministry. The duty of that in the Ministry of Finance is to represent the interests of the officials before their superiors. The Councillors are enjoined to act so that the sense of duty and joy of labour, the mutual confidence of subordinate and superior, are enhanced. Demands and suggestions of the Staff relating to general personal affairs in the Department are to be considered by the Council and represented before the heads of the Department. On the other hand, the superiors are to consult the opinion of the Committee in the regulation of Departmental routine, the hours of work, the laying down of principles for deputations, annual leave, sundry welfare institutions, the re-employment of those dismissed from the Service. And when the person specially concerned wishes it, the Council is to give its opinion on miscellaneous welfare matters like refusal of leave, recommendations to physicians, distribution of dwelling-places, whether or not there is a title to an addition to pay on the ground of place of residence. The various Ministries in the Reich and in Prussia have established Committees of this kind—they are purely advisory.

The Ministries do not treat the Committees as alternatives to the

[1] Cf. Art. 15, p. 1536, Chambre des députés, Documents.

[2] Cf., for example, among the saner of those who desire the Service turned over to the independent discretion of associations, Georges Mer, *Le Syndicalisme des fonctionnaires*, 1929.

Civil Service Associations,[1] but they have several times expressed their desire that no individual cases should be represented by the Associations, though they are always ready to deal with any exceptional case where misunderstandings and errors can be swept away.[2] Of the tendency to carry individual grievances to the Associations the Reich Ministry of Finance and the Prussian Ministry of Justice have complained. The latter [3] points out with considerable justice that the associations are not in a position to sift out the truth or falsity of the complaints. The result is that the Department is unduly bothered with communications. The complainant is not well served by such a procedure since his complaints must ultimately revert to the place of their origin for investigation. But if the Officials' Committee were at once approached, it could quash groundless demands and recommend the substantial ones. Prompt and just decisions can be made in this wise. The special evil of approaching the Associations is, however, this, that the Committees do not get the amount and degree of work they are well fitted to carry out and confidence in them is generally weakened.

'Until now (1922) it seems as if the recognition that the Officials' Committees when properly employed can be effective in an extraordinarily fortunate way has not yet found general extension. They can re-inforce a strong bond of confidence between the individual official and the Departmental Authorities, as well as avoid superfluous written communications. Without prejudice to the pending statutory regulation of official representative bodies let the departmental authorities already begin to act in a fashion calculated to maintain the status of the Committees in all respects, so that they may be in a position to fulfil their duty for the welfare of the Civil Service.'

Here is a problem which has arisen in the relationship between the Trade Union organizers and the Works Councils in private industry. It is very difficult, excepting in special cases, to lay down a rule, as to where the competence of the one begins and the other ends. There is much good sense in the remarks we have quoted above; and we calculate that they will everywhere be necessary. For there are always individuals with grievances and idiosyncrasies who take the stage as potential martyrs; there are those with a persecution-complex, and others litigious to the extreme. It is a frequent thing to find a man or woman who prefers *not* to be tried by his or her peers; since chicanery and prevarication do not impose upon one's colleagues for long. And there are always Ministers and heads of Departments who do not like even the proper intervention of the Association.

[1] It is, perhaps, owing to the strength and the ability of these associations that the full development of the Councils has not yet occurred.

[2] *Beamten-Archiv*, II, 31.

[3] *Ministerialblatt fur die preussische innere Verwaltung*, October, 1922, p. 1082.

The Committees have not the executive force of the British Whitley Councils, but they are nevertheless the moderators of minor distempers.

Let us glance at the provisions of the Statute now under discussion.[1] Councils of officials are provided to represent the officials in relation to the official superior at various stages: in relation to the Head of the Department, in Divisions of a Department, and Branches and District Branches of a Department. In other words, there is, as in England, to be a system of central representation, representation by industrial divisions, and representation by local Councils. The Councils do not consist of joint bodies of officials and superior officers as in the English system, but of officials only; and they are elected by officials in secret and direct ballot for two years. Officials may vote at twenty; to be elected they must be at least twenty-four years old; only officials in service past the probationary stage are eligible, and they must have served at least three years, and for at least three months as a member of the body of officials electing them. Special bodies are established for appeals arising out of the elections, with a supreme court in each state of the Reich, consisting of one judge and equal numbers of superior and subordinate officials, the judge chosen by the Government, the rest by the officials. The numbers on the Council are calculated by proportion to the numbers of officials to be represented (Clause 15). Section II of the project establishes broad rules of procedure; resolutions being valid on ordinary majority vote in a quorum of one-half the membership. Here two points are of special importance: members of the Councils are obliged to treat all information, votes and proceedings as confidential, and the Councils must be allowed to see, in so far as their duties make it necessary, all the laws, rules and orders, and, with the assent of the official concerned, his personal record, and other relevant material. What are their duties and powers? This is dealt with in Section III of the project. The Councils assume the protection of the condition of the officials in relation to their chief on these terms: (*a*) The Councils cannot take any *direct* measures; (*b*) they must, in their actions, be guided by the attempt to enhance the sense of duty and joy in work of the official by promoting mutual understanding and confidence between officials and their chief, and co-operate in the maintenance of a trustworthy and dutiful Civil Service; (*c*) the Councils have the right to hear, discuss and convey to the chief all suggestions and proposals of a general kind, especially in regard to welfare, to make suggestions for better administration, to settle differences between officials arising out of their Service, to make representations in regard to difficulties arising out of Service regulations and

[1] *Entwurf eines Gesetzes uber Beamtenvertretungen*, 1930. Note: the German Councils are to be established by a *law*; the British Councils are established by Treasury arrangement.

their alteration, to watch and suggest improvements in Service arrangements which might produce accidents or ill-health. So far this is merely a power of advice. There is next a power to co-operate with the chief in the establishment and alteration of general rules of management of the Department in so far as the personal situation of the official is concerned, in the establishment of Service hours, of principles for the regulation of the Councils, of the annual plan of leave, the granting of extraordinary rewards, the appointment of medical referees. At the request of the officials concerned, this power of the Councils extends to investigations of accidents, compulsory retirement, notices of dismissal, refusals of leave, requests for relief and other welfare services which are provided in Germany for poor and ailing officials. The Councils may make representations regarding the local preparation of the Budget for the establishment, the training of officials, the re-employment of officials dismissed as a punishment, the appointment of non-legal members of Service disciplinary courts; and further, at the request of the official concerned, if the department seeks compensation for damage from an official, when a penalty is threatened for breach of a Service regulation. They may nominate three members for each examining body on which a subordinate is appointable: but not where the examination is technical.

What force have the Councils? In the cases where they are simply to be representative and advisory, only the force of their good sense as it affects the chief; if he disagrees with them he has only to give them the main reasons why (Article 39). Where the Councils have a right of 'co-operation' they may appeal against the decision of the chief to the next superior, and the next Council, if there is one. Here again the chief may reject the views of the Council, with reasons. The Councillors are protected by a series of regulations (Sect. V).

A memorandum accompanying this Bill gives this as its fundamental reason: 'In proportion as the number of officials subordinate to a chief has increased, and the more distant the personal relationship between chief and individual official has become, the more deeply has the Service felt the need for a mediating authority!' It says that written procedure is to be avoided as far as possible: 'oral procedure is preferable in the interests of a speedy clarification of views and the abolition of misunderstanding and differences of opinion'. The usual thing is for the Councils to proceed separately, yet the chief may request to be present in person or through a representative.

In the main, the Councils act 'as mediators, advisers, and commentators'. An earlier Bill permitted appeals to an 'arbitral committee', but this is now refused on the grounds of ministerial responsibility:

'The Minister is subjected to the control of Parliament, he is responsible *only* to Parliament (except for the competence of the High Court of State);

Parliament can make him resign at any time, if a majority has no longer any confidence in his administration. It would therefore be a contradiction if the decision were taken out of the hands of Ministers, and given to authorities which would take away from the administrative discretion proper to the Service, and from the sphere of power of Parliament.'

Thus, Committees through which officials may represent their grievances are of exceedingly recent date. (The U.S.A. Civil Service has, with unimportant exceptions, no such Committees.)[1] The system is still upon its trial, and even at its best is confined to the minor adjustments of Staff matters which are in any case troublesome to superiors, and occasional consultation on matters like the general principles of superannuation, classification and promotion. The maintenance of rights cannot be as yet entirely left to such instruments. Officials must still rely upon their associations for a show of power. There is no authority without an awe-producing element, whether it be spiritual, like the force of personality, the impressiveness of talent or the appeal of justice, or simply physical, varying only in the manner and strength of its application. It is hardly possible for the Civil Service at present to forgo either the one or the other; but in proportion as institutions of the kind we have just discussed are developed and full scope given to the former, the threat of physical injury (which of course carries with it spiritual disablement) will become more and more dispensable.

Industrial Court. The arrangements so far indicated are not concerned with adjustments of pay, but only England provides a special Court for clauses regarding the pay, in relation to the working conditions of the Service, among the countries with which we deal, though Australia has a fairly long experience of a Civil Service Arbitral Court. We indicate the main elements only of the English system.

Early in 1917 a Civil Service Arbitration Board was set up as a result of agitation by Civil Service Associations because the War had sent prices sky-high while wages lagged far behind. But for years before agitation and difficulties regarding pay in the Post Office had produced special committees on the question, and the recognition that some permanent machinery ought to be established for the settlement of claims regarding payment.[2] Two motives can be seen at work: the realization that 'There is no worse tribunal in the world for fixing a scale of wages than the House of Commons', and to free Members of Parliament from intolerable pressure. The Board established by the executive authority of the Government was to deal by conciliation or arbitration with questions arising with regard to claims for increased

[1] They were recommended by the Re-classification Commission (Report, Part I, p. 141 ff.). Thus: a Central Advisory Board, and Departmental Boards, of equal numbers of superiors and subordinate officers, for advisory purposes, and *conciliation*.

[2] Cf. *Royal Commission C. S.*, 1929, Memoranda, p. 77 ff.

pay made by Government employees, except in the cases of industrial staffs, and where there was already recognized machinery applicable to the case. It referred only to posts under £500 a year. The Board consisted of two members and a chairman, one member was appointed from the panel of employers' representatives, and the other from the panel of employees' representatives, and the chairman was a Government nominee. Civil Servants rightly complained that such a Board was not impartial, since they had no direct power of nomination or agreement in relation to the employees' representative, who was put on the panel by the Ministry of Labour in consultation with the Trade Union Congress. He was at best a representative of the general public. Many cases were heard by this Board, however, and its awards and agreements were highly important to Civil Servants.[1] Suddenly as part of the general post-war attack upon government expenditure and the standard of living, the Board was abolished in February, 1922. The alleged grounds of abolition were that the Whitley Councils considered questions of remuneration.[2] Now since the Whitley Councils can only declare and not enforce a recommendation this plea was fallacious, perhaps dishonest. Civil Servants were driven either to accept the loss of the Court, or to resort to the strike when conditions became so bad that mere grumbling offered neither vent nor remedy, or to start a campaign for the re-establishment of the Court.

An intense campaign was conducted and ended with the re-establishment of the Board early in 1925. Its constitution is part of the Industrial Courts set up by the Act of 1919.[3] In the present case the Court consists of a chairman who is either the President of the Industrial Court or the chairman of a Division of the Court, together with one member drawn from a panel of persons appointed to the Industrial Court by the Minister of Labour as representing the Chancellor of the Exchequer for the time being (this is the employers' representative), and one member drawn from a panel of persons appointed to the Industrial Court by the Minister of Labour after nomination by the Staff side of the National Whitley Council. Civil Servants and officials of Civil Service Associations are ineligible for appointment as members of the Court.

Only claims in regard to salaries of £700 and less can be referred to the Court, unless by the consent of the parties concerned in the claim. When negotiation fails arbitration is open to the Government Departments on one hand, and the recognized Civil Service Association within the scope of the National Whitley Council on the other hand, on application by either party. The matters which may be taken to

[1] Cf. *Royal Commission C. S., 1929, Memoranda*, pp. 80–2.

[2] Cf. Select Committee, National Expenditure, Cmd. 1889, Chap. VIII, Part XI.

[3] Statutory Rules and Orders, 1924, No. 554/26; Treasury Circular, 14 March 1924; Rules of Procedure, 28 November 1927 (reproduced in *Royal Commission C. S.*, 1929, Memoranda, Appendices).

the Court are claims affecting emoluments, weekly hours of work and leave. But claims can be made only for 'classes', i.e. 'any well-defined category of Civil Servants who for the purpose of a particular claim occupy the same position, or have a common interest in the claim'. This provision limits the work of the Court, and were it not so, individual cases, and cases of small groups, where inequalities in respective pay and work were concerned would cause a continuous rush of claims for related adjustment, and destroy any stability for the Treasury and Parliament. The whole problem of classification would be reopened and never closed. This, of course, unfortunately imposes hardship on some officials, and the hardship is a direct result of large-scale organization, and the exigencies of parliamentary control. Civil Servants are generally satisfied that they have secured a very valuable piece of machinery for removing grievances. It is acknowledged that the Court is fair, patient, and thorough. But one criticism is heard. The Treasury is the sole interpreter of the terms of the judgements of the Court, and may take action before submitting its intentions to the Court.

The Staff side have requested that the Treasury be limited in its power of interpretation, and that, say, the Ministry of Labour, should decide between its view and the Treasury view; and that there should be some limitation on the action of the Government affecting remuneration and conditions of Civil Servants without first submitting such matters to the judgement of the Industrial Court. The Government has rejected such requests on the grounds of their general political responsibility, which requires that they shall not be bound.[1] The Royal Commission (Report, 145 ff.) recommends no change in the constitution or jurisdiction of the Court, except a wider definition of 'class', and the substitution of £1,000 for £700.

Between 1925 and the middle of 1929, 148 cases had been submitted to the Court, five by the Staff side of the National Whitley Council, twenty-seven by the Staff side of the Departmental Councils, and 116 on behalf of associations or groups of associations.

Australian experience shows the importance of ultimate Treasury control, the continuance of the tradition that the Treasury is always master though there may be occasional appeals, and the restriction of the cases which may be submitted to the Court to 'classes'.[2]

THE GUARANTEE OF RIGHTS

How far does the State define the rights of Civil Servants, that is the rewards and penalties of their work, and offer means of recourse against itself when the official feels these are violated? It is obviously

[1] Cf. declaration of Financial Secretary to the Treasury, 9 March 1926, and that of Prime Minister, 2 February 1927.

[2] Cf. Australian Royal Commission on Public Service Administration, July, 1920.

unjust, and practically foolish, for the State to demand that Civil Servants shall deprive themselves of their defensive associations if it does not set up institutions which will offer them protection. All this raises many questions of formal law: the nature of the State as employer, the doctrine of auto-limitation of the State's power, whether it is possible to sue the State; and these questions have given lawyers, especially on the Continent, an enormous field of activity, and often caused them a tremendous waste of good time. For, in the end, these are not questions that can be decided by legal logic, and they would never have been raised did the State commence to-day without any legacy of its old absolute authoritarian self, a legacy which confuses the issue by setting up two fictions one against the other, State and Subject. But we have learnt that such problems are practically posed in terms of the inter-relationship of social groups; and if we regard the present problem in this light it is quite feasible, and not as may even be considered to-day, unnatural, to give the social group constituted by the Civil Service recourse against all the others who are served by it. It sounds different when we set the Civil Service and the State against each other. It has been otherwise in the past because this opposition was construed into one of constant and necessary hostility. Though the last quarter-century has witnessed a change of mind in this respect, there are still some who maintain the old tenets, and unfortunately the law has not yet caught up with even moderately enlightened opinion. Some countries have still sixteenth-century notions written and active in their statute books.

England. The British system still operates upon a legal basis as old as it is unjust. In other branches of the British Constitution it is possible for the defender to say that the practice is more up to date, more rational than the law, but in this, definite hardship and insecurity are of frequent occurrence. Arising out of the ancient doctrine that 'the King can do no wrong', and that Civil Servants are servants of the Crown, it has been assumed that the Crown may dismiss its servants at pleasure.[1] This provides the Head of the Department with disciplinary power. Until quite recently there was no machinery to safeguard the reasonable use of this power, the Civil Servant having only an *ex gratia* right to appeal to the Head of the Department from the disciplinary action taken by those to whom the Head had delegated his power. No law or general administrative code lays down a scheme of disciplinary misdemeanours and accompanying penalties. A Civil Servant has no legal action against dismissal. His superannuation rights are ultimately determinable by the Treasury, for its interpretation of the Acts is not challengeable in the Courts. It may be pleaded that the Head of a department would not hurt

[1] Emden, *The Law and the Civil Servant* (1927).

anybody unreasonably, and that the Treasury would rather be kind than cruel: unfortunately for human relationships, not all men are good, nor wise, nor well informed. Hence machinery is necessary to correct the deficiencies of men acting spontaneously. The only guarantee which Civil Servants possess is the promise made by the Treasury in Circular No. 57/20 of November 1920, adopted as the result of a formula adopted by the National Whitley Council. This says that 'except in cases which may give rise to criminal proceedings, full particulars of any charge against an officer's conduct shall be communicated to him in writing before any disciplinary action be decided upon'. The question of reports affecting promotion, that is, mainly the Annual Reports, was left to the consideration of the Promotions Committee: and this decided that in the case of adverse markings the Civil Servant must be given a written intimation of his assessment, with particulars and reasons. Finally, when a report upon an officer in circumstances not covered by these arrangements reflects upon him adversely he must be informed of the alleged defects in order to enable him to make explanations before the report is placed on record. This is an advance upon the system of reports which may never be disclosed, which may accumulate a mass of opinion unfavourable to a servant, and which may be an obstacle to promotion or the cause of disciplinary action, without the servant having the chance of dispelling that which is not true. Besides this the Staff Side of the National Whitley Council complain that in practice the arrangements for interrogation are not appropriate, that the gist of the report with which the official is acquainted often differs from the full Report which is now a privileged document, and that the judgement of the senior officers is unsound. Hence, they ask for the full reporting of adverse reports, and in the case of (*a*) misconduct and breach of discipline the right to appear before a Disciplinary Board, to appear through a representative of a Staff Association or colleague, and to call all relevant evidence; and (*b*) regarding adverse reports there should be an Appeal Board; the Disciplinary Board should be a Central Board consisting of one individual with judicial experience in the sifting of evidence, while the Appeal Boards should be Departmental, consisting of Civil Servants of at least two grades higher than the officers concerned.

There is no valid defence of the old system, or the incompleteness and possibilities of injustice of the present system. It persists owing to muddleheadedness and that ultimately cruellest of incompetency, the *faux bonhomie*, which laughs reason out of court with the charming guffaw: 'We need no law. Depend upon me!' It is bad for both master and servant. It is an unwarranted and wasteful relic of the days before a Civil Service came into existence. And unless there is a proper change there is no corresponding moral right to ask Civil Servants to work hard and well, to consider the Service as a life career

and to give up the idea of affiliation with defensive bodies like the T.U.C.[1]

America. Nor is the situation any better in the U.S.A., for that country rejoices in principles and methods derived from the same source as the English Common Law on this subject, and has made no improvements upon it. The power of dismissal has been made strict and absolute by the judgement in *Myers v. U.S.A.*, and the right to answer adverse reports or to appeal against disciplinary action is in the primitive state of development of the English system before the Treasury Circular of November, 1928.

France. In France the evolution of the last quarter of a century has resulted in the establishment of a series of legal guarantees for Civil Servants. This development is the direct issue of two legal institutions unknown to Anglo-Saxon law: the suability of the public authority and action for excess of power. These are explained further in the chapter on Legal Remedies against Public Administration, but a short indication of their import is necessary here. The suability of the public authority means that the State furnishes the opportunity for the challenge and the quashing of any of its actions which are inconsistent with the law, and redress for damage *from the State*. Such cases are ultimately heard by the *Conseil d'État*. Then, secondly, any person having a personal interest in such an *ultra vires* action may take proceedings in as easy and convenient manner as if he were conducting an ordinary civil action; in fact the actions are easier to take.

For the safeguarding of his everyday working conditions, then, the French official has to look to two sources: first, his written or customary rights, and secondly, the *Conseil d'État* which will deny validity to any regulation or decision affecting him which violates the rights. As we have already seen, there is no single coherent statement of Civil Servants' rights: there are simply a number of decrees, rules of public administration, and departmental regulations affecting appointment, promotion and discipline, and the financial and special laws of various dates affecting payment and pensions. All these establish interests for individual Civil Servants, and by the evolution of principles in case after case the *Conseil d'État* have provided a sound guarantee of these interests. There is no guarantee, of course, that the laws and regulations may not be altered without consultation of the Civil Servant; that may and does happen. There is a guarantee that while the Department works on the basis of any particular law or regulation, any decision which is made known can

[1] The Royal Commission (Report, p. 173 ff.) recommends only that in serious cases the Civil Servant shall have the right to oral proceedings before a senior officer of the Department. He may have associated with him a colleague, or a representative of his association. In all cases of misconduct the charge is to be written and supported by a statement of facts.

be challenged on appeal of any ordinary official, and pronounced invalid if it is inconsistent therewith, or transgresses the principle that official discretion shall be used not for personal ends, but for the demonstrable ends of good public service. For example, the decision in an often-recurring difficulty whether an official is on the establishment of not, can ultimately find itself referred to the *Conseil d'État*,[1] as also the extent to which service in either the local or the central administration counts for pension, where the service has been in both. In regard to general disciplinary measures the jurisprudence of the *Conseil d'État* is exceedingly extensive, since it was the first undertaken in point of time, before the middle of the nineteenth century. Any irregular nomination which will adversely affect the professional prospects of an already appointed Civil Servant can be the object of recourse for excess of power, and many such actions have been taken and have succeeded. In early decisions (1903 and 1904)[2] indeed, it seemed as though the principle was to prevail that any Civil Servant, directly affected by an illegal nomination, but acting as it were for the general interests of the Service, might take action. Later decisions have confined the right to action in the same or an inferior class where they might be prejudicial to the interests of the complainant.[3] Still later decisions have swung between the two possibilities, but the tendency is plainly only to accept actions where prejudice to personal position and prospects is created.[4] The rules relating to promotion lists are maintained in this way. Dismissal, which is the greatest danger menacing an official, especially since it abolishes the title to a pension, is challengeable on the question of its regularity, its injustice and its brusqueness.[5]

Where Councils of Discipline are established and have not been regularly invoked before a disciplinary penalty has been imposed, the penalty becomes invalid. Many cases have been raised on the basis of the Law of 1905 which gives Civil Servants the right to inspect their personal records. The article says:

'All civil and military officials, all the employees and workers of all public departments have the right to the personal and confidential communication of all notes, memoranda (*feuilles signalétiques*) and of all documents composing their personal records, whether before being the object of disciplinary measures or a removal from office, or before being kept back in their promotion by seniority.'[6]

[1] Cf. Hauriou, op. cit., 10th Edn., p. 582 and notes thereto.

[2] Cf. Ahbert, *Le Contrôle Juridictionnel de l'administration* (1926), p. 117; Decisions of 1903, *Lot et Molénat*, and 1904, *Savary*; cf. also Jèze, op. cit., II, for guarantees re nomination, promotion and pay and pensions.

[3] 14 May 1916, *Sirey* re *Ohrisser*. [4] Ahbert, op. cit., p. 121.

[5] Hauriou, op. cit., p. 587, and footnote.

[6] 22 April 1905, Art. 65. Characteristically of French legislative methods this is in the Financial Act of the year. Cf. Dalloz, *Code Administratif*, p. 489.

This legal rule was a very important advancement of the protection of public servants, and the *Conseil d'Etat* by its decisions has created the situation that the superior must notify the subordinate of the intended action, so that the subordinate concerned may demand his records and be able to present his justification. On all sides the *Conseil d'Etat* has hedged this right with defences.[1] So with pension rights, which have been interpreted on very just lines.

What French law has done, then, is to create the theory that a subordinate in the Civil Service is towards his superior in the position of an administered person. As the Civil Service may abuse its power *vis-à-vis* the ordinary citizen, so may the higher Civil Servants do to the lower. It is of course possible for such a system to weaken the efficiency and subordination in the Service. Recognizing this the *Conseil d'Etat* has carefully refrained from interfering in two classes of events. The first is in the laws and rules which organically regulate the Service. They may be such as to change the prospects of the Civil Servant. It is obvious that if a wide power of appeal were given in these matters the public interest might suffer under the influence of the personal interests of individual Civil Servants.[2] The *Conseil d'Etat* is bound therefore to distinguish carefully between the legitimate pretensions of a Civil Servant in matters of this kind, and others. Much the same holds good of a second class of rules: those laying down the principles of execution, that is, the orders and instructions of the superior authorities. For example, a cashier at a municipal credit institution (to be precise, the French equivalent of a pawnshop) was refused permission to challenge the rule whereby the Council of Administration of the institution issued its loans. Matters of this kind are better dealt with in representative councils. What the Court has been able to do, then, upon the basis of the laws and regulations, it has done in a spirit of justice and with promptness. Its deliberations are public, and its judgements and reasons for judgements published, and annotated in well-known periodicals. It has been called 'our best judicial monument'.[3]

GERMANY

The country in which rights and guarantees have best evolved is Germany. We speak of the Reich, and particularly of Prussia, which invented and developed the code afterwards adopted almost entirely by the Reich. We need not say more of the cause contributing to this development than that it was a direct result of the concentration of Prussia's political development in bureaucratic channels. That

[1] Cf. Duguit, op. cit., II, 150 et seq., and Jèze, op. cit., *re* disciplinary cases, III, 75 ff.

[2] Cf. refusals of British Treasury to be bound to submit proposals to Arbitration Court before their execution.

[3] Alibert, op. cit., p. 329.

which people value receives their care. The result is that the rights and guarantees of German Civil Servants, Reich, State and Local, are well founded. We can best appreciate this if we analyse them in this order: (1) the theory and convention of acquired rights (*wohlerworbene Rechte*), (2) the rights as contained in the laws and regulations (*a*) economic and professional, and (*b*) disciplinary, and (3) the legal procedure which makes these rights effective.

1. Perhaps too much importance can be attached to the acquired rights. Were it not begging the question we might better call them 'imprescriptible rights', since all rights are acquired, but not all are deemed or guaranteed 'imprescriptible' and these are claimed by some to be 'imprescriptible'. The Reich Constitution contains this clause: 'The acquired rights of public servants are inviolable.'[1] What importance is to be attached to this clause? Its legal import is the subject of great differences of opinion among eminent jurists. Some argue that it does not protect officials from the effects of any law, constitutional or ordinary, which, made after their entry to the Service, disadvantages them compared with the terms and expectations upon entry.[2] Others hold, for example, that the conditions of superannuation cannot be altered by an ordinary law, only a constitutional amendment has legal effect.[3] It is argued that this guarantee can bear no extensive but only a limiting or restraining interpretation.[4] There is much in this view, for it would seem a difficult if not an impossible thing for a State to bind itself to maintain conditions which are constructed to fit a particular economic and social situation when the situation has altered. Yet this position, of full inviolability, has been taken up by at least one representative of the official class.[5] He says:

'The acquired rights of officials, that is the rights and the privileges secured to officials by administrative orders or by statute, are armed with an enhanced legal protection by Article 129 compared with the ordinary subjective rights, and the article therefore creates positive law.'

Though he admits that having regard to the variety of additions and amendments offered during the debate upon it, it is difficult to know exactly what was meant to be included, yet he argues that the history of the article shows that 'when the Reich faced the question what was to be the attitude to the hitherto existing rights of officials? the unequivocal answer was made:

'The acquired rights are inviolable! The will and the clear phrascology have it that all rights belonging to officials ought not to be altered to their disadvantage. Thus this is not merely a programme of the Reich Govern-

[1] Art. 129, third sentence. For history, see Schroder, *Die Wohlerworbenen Rechte der Beamten* (*Art.* 129 *R.V.*) (1930).
[2] Anschütz, op. cit., p. 340. [3] Giese, op. cit. [4] Anschütz, op. cit., p. 339.
[5] Assmann, *Wohlerworbene Beamtenrechte* (Berlin, 1924), p. 19.

ment, but, as previously said, a directly effective positive right. Article 129 of the Constitution by its form and purpose does not merely accrue to the officials employed at the entry into force of the Constitution, but it is effective for the future and guarantees also the acquired rights which were later established.'

Naturally the whole nature of the clause turns upon the extent to which Ministers and the Courts accept the wider or narrower interpretation of its limiting force. Already both these authorities have taken what is obviously a position not fully asserting nor yet wholly denying the full extent of security assumed by such writers as the one we have just quoted. While, in 1921, the Reich Minister of Justice said that he would oppose any denial or reduction of already existing claims, he significantly added that Article 129 did not demand a constitutional amendment for every amendment of the law relating to Civil Servants. The Prussian Minister of Justice maintained the same position.[1] Since there is no action at law for a general breach of this clause, it is defensible only by actions for any special breach, like the violation of salary rights, and, as prior to the coming into force of the new Constitution, the official has no other way of contesting such a violation of his right excepting in special legal forms.[2] A case of this kind enabled the High Court to define its attitude towards the 'acquired' rights.[3] The following things were, in its opinion, to be the constituents of a judgement: the law; the conditions out of which the law issued, that is, the historical development of the Civil Service to the establishment of the Constitution, *regard being had to the nature of the Civil Service*. The words we have placed in italics are susceptible of wide interpretation, and in any particular case, the Court could emphasize either the claims of the Civil Servant to benefits, or the claims of the public to duties and subordination. For example, following out its own prescribed method, the Court emphasized the relationship of the Civil Servant to the State for life, that he must work while he is capable, in return for which he received maintenance 'proper to his station'; when incapacity arises he and his family receive pensions. He has a right to life tenure of his situation extinguishable only by certain legally prescribed events: resignation, penal conviction, incapacity, and until these acts have occurred he loses neither his situation nor his claims to compensation. And so on. As to Article 129, its intention, as deducible from its evolution, was constitutionally to safeguard the Civil Service against movements which threatened its rights. It could be applied and evoked therefore only where such rights, like rank and salary, which *definitely belonged to officials*, were challenged. In a Bavarian case[4] the article has very similarly

[1] Reich Minister, 3 May 1921; Prussian Minister, 7 February 1921.
[2] *Beamten-Archiv*, III, 56.
[3] Reichsgericht, *Entscheidungen*, Vol. 104, p. 61 (March, 1922).
[4] Reported Assmann, op. cit., p. 24.

been taken to mean the protection of the rights which accrue to officials out of the *official relationship*, an exceedingly elastic term, and these rights must be sought in the law and regulations by the judges who are the protectors of the Constitution. Various special judgements have partially elucidated the clause. The malleability of the regulations of service and salary are an indispensable necessity for the public services.[1] The fact that two Service grades received the same pay before 1919 was no claim to the maintenance of equality afterwards: one could be raised (though the lowering of the other was another question).[2] Any new distribution of duties between a department must not infringe acquired rights: the pay therefrom still belongs to the official.[3] The Salary Economy Law (*Besoldung-spargesetz*) recognizes only the acquired rights of individual officials and, then, only rights to definite higher salaries: *classes* of officials appointed after the passing of this Act, and appointable in the future, have no such acquired rights. It was not the intention of the Constitution to create special advantages for the officials of any special department.[4] The fact that an official was once head official does not give him any claim to challenge alterations in office organization. 'Development may lead to such organization as to pass beyond his position.' But his pecuniary claims must not be diminished, though the situation may be called by a new name.[5]

The factor common to the various decisions, executive and judicial, is the extreme care which has been imposed by the Constitution.

There have been great changes in the law relating to Civil Servants since 1919, especially on the side of their compensation, and many groups have complained that their situation was worsened by these changes. The Constitution did not prevent these changes nor retard them, but it created what all constitutions are intended to create, a special sensitiveness to the rights guaranteed. It produced carefulness, deliberation and consultation, and put a heavy drag upon rough-shod legislative riding-over of legitimate expectations. This, and not much more than this, was, in my own opinion, intended by the nature of the Constitution, and not more than this is obtainable, since the State is from time to time obliged to renew its institutions even at a sacrifice. Obviously all depends upon the manner in which the sacrifice is exacted, and this is precisely the object of the clause relating to acquired rights. It is to safeguard them from violent, rough, abrupt shocks. During the debate upon this article in the National Assembly, Hugo Preusz explained its origin, and it is clear that this was due to a merely accidental and

[1] Decision 16.5.24, *Beamten-Archiv*, V, 24.
[2] Decision 24.6.24, *Beamten-Archiv*, V, 60.
[3] 23.5.24, *Beamten-Archiv*, IV, 744.
[4] Reich Treasury, 16.4.24, *Beamten-Archiv*, IV, 595, 597.
[5] Decision 27.5.24; IV, 743.

passing, though a serious, cause.[1] The onset of the Revolution produced great perturbation, uncertainty and queer rumours of the abolition of the professional Civil Service, dismissal at pleasure, and other such coming things.

'Thence arose a desire to provide a security in the Constitution that the professional Civil Service and its acquired rights should continue to exist. It were highly desirable that there should have been put into the Constitution only the maintenance of the status of the professional Civil Service. In accordance, however, with the demand to go into details, individual special conditions were included, which really belong to the Civil Service Act soon to be introduced to reform the law.'

However, no constitutional clause has ever been for long interpreted by reference to the motives of its origin; even in the course of the debate to which we are referring differences had already arisen on the interpretation of the sentence. Its practical effect has been to restrain governments from rashness, and this seems most likely to be its future function, too; though how far that restraint should be extended will be a constant bone of contention, if we may judge by experience, since the officials' representatives will seek perfect inviolability, while the Government will be compelled to deal with these rights with justice to the public.[2]

2 (*a*). The economic and professional rights of a German Civil Servant are wide, clearly stated, and given point and detail by over half a century of judicial and administrative decisions. No person who aspires to enter the German Civil Service need be without a knowledge of his rights, for the commentated codes are numerous and easy of access. They are publicly stated and the reasons upon which they are based are not hidden away in a Department of State, as in the British Treasury, but are given the same publicity as any law or proceedings in a court of justice. It is quite outside the scope of the present work to describe the substance of these rights. All that we propose to do here is to insist upon the completeness and rationality of the whole scheme.

There are (i) some rights which the Constitution guarantees, in clauses we have already discussed under other aspects. There are Articles 129 and 130. We have already reproduced the latter. The former runs:

'Officials are appointed for life, in so far as the ordinary law does not lay down other conditions. Pension and allowances for dependents will be legally regulated. The acquired rights of Civil Servants are inviolable. Officials have action at law for their pecuniary claims.'

(ii) Laws and regulations lay down in great detail the conditions of the commencement and ending of the official relationship. (iii) There

[1] Heilfron, op. cit., VI, 3973 ff.

[2] See further, Buschke, *Die Grundrechte*, 63 ff.; Nipperdey, *Die Grundrechte*, Vol. I, Art. 129.

are honorary or professional rights (*Ehrenrechte*), like the Title, Rank, Orders and Symbols of Honour, Official Insignia and Uniform. (iv) A tremendous body of law regulates Pecuniary Rights. Income is regulated as to the conditions under which it can be claimed, permission to claim it, time of payment, place and manner of payment, repayment, the withholding of payment, etc., etc. Of what parts does this Income consist? Of Basic Pay, Increments for Seniority, additional Sums for Local Conditions, Occasional Payments, Endowment for Wife and Children, Official and Rental Dwellings, etc. Compensation is set out in detail for the cost of moving from one locality to another according to the requirements of the service; and travelling expenses are regulated in a thousand particulars. Payment and the condition thereof for officials seconded out of the Service owing to departmental reorganization is arranged, and the axe is not allowed to fall, in the interests of the State, without the officials having a clearly expressed right to some compensation and the possibility of challenge where interests of the State are ambiguous. With the same detail and logical care the right to superannuation, the amount thereof, the number of years of its validity, and the condition of commuting for a capital sum, the condition of the loss of claim, the Civil Servant's rights in case of accidents and invalidity, of the rights of his dependents to care-sponsorship, are regulated.

No doubt can exist of the truth of the notion general in German parliamentary, legal, and popular discussions, that the Civil Service has a well-defined body of rights accorded to it by law and by the ultimate assent of the people. Not only do these rights exist, but there are ways whereby the Civil Servant can challenge any but the smallest of disciplinary measures against him.

Procedure. 2 (*b*) and 3. Let us consider, first, the legal arrangement whereby the general body of economic and professional rights are maintainable. They are defensible in ordinary Courts of Justice, but neither as a part of the ordinary private law of the land (that which regulates contracts and the relationship of master and servant, among citizens), nor by the employment of ordinary civil procedure. For the principle which still holds good on the Continent generally is that the relationship of Civil Servant and State is a special relationship arising out of the public interest; therefore it is regulated by a special branch of law called Public Law (*Öffentliches Recht*) which has the public interest in eye when creating and making judgements on the rights of Civil Servants. We have come upon this peculiarity before. It is not present in British or American law with the same form and definiteness as it is to be found in Germany and France.[1]

[1] Further, modern recommendations for improvement in England go in the same direction as that of Germany and France. Cf. recommendations of Staff side National Whitley Council before Royal Commission C.S., 1929, *Statement*.

It has its advantages and disadvantages which will be discussed in another chapter. It is enough here to state that the distinction exists and that Public Law considerations affect the machinery whereby the Civil Servant's pecuniary rights are guaranteed. The Prussian Act of 1861 laid down the preliminaries and procedure of such recourse, and the rules are still valid, both for Prussia and the Reich, though the Constitution has by Article 129 extended the right to recourse to *all* officials.

Action can be taken by any official who has a *pecuniary* claim arising out of his Service situation.[1] Every right (with some exceptions negligible in the context of the present discussion) we indicated in the bald summary is the ground for such action, and can be prosecuted if salary, pension and other dues are denied wholly or in part, or if the dues are not calculated according to the law.

It is a general principle of Civil Service Law [2] that the ordinary Courts are only to be called in if the Civil Servant has vainly sought the substantiation of his claims by the administrative authorities up to the highest instance, since, if this substantiation is granted, any other procedure is unnecessary. Therefore the Act of 1861 prescribes that the decision of the Departmental head must precede an action. If a decision is sought in regard to a pension claim the Departmental Minister and the Ministry of Finance must first have been approached and have given their judgement. Decisions given by these authorities do not in any way bind the ordinary Courts, they are only formal conditions of bringing an action before the Courts. The utility of this procedure is obvious: for subordinate and superior it is more convenient than immediate recourse to the Courts, and it causes less psychological disturbance than a direct and unnotified action. On the other hand, an official who has a serious grievance, the justice of which is so problematical as to require an appeal to all instances before he is satisfied, is subjected to a very laborious process before he can come before a non-administrative court. There is a time-limit to the right of action: the right expires six months after the highest competent administrative authority has given its decision. (Notice that this rule is not overcome by Article 129 of the Constitution on the inviolability of acquired rights—you may have these acquired rights, but if they have been violated you cannot defend them excepting within this period.) [3] Further, there are stated periods after which claims cannot be made before the administrative authorities, and they are of a sufficiently liberal character. Certain governmental authorities are designated as representatives of the State, known in its suable form as the *Fiskus*, and these are sued, and defend the administration against the suit.

[1] Cf. Brand, op. cit., p. 395 ff. for all details. [2] Loc. cit., p. 398.
[3] Brand, op. cit., p. 402, based on Reichsgericht decision, Vol. 108, p. 146.

Action, whether it is the Civil Servant against the Fiskus, or the Fiskus against the Civil Servant, is taken before the ordinary State Courts of Justice. The parties may appeal to the Supreme Courts of the States, and there is a further appeal, partly in order to secure a uniformity of jurisprudence in the most important Civil Service problems, to the Reich Court.[1] The Courts are bound to a procedure different from their ordinary rules and principles. The reason is plain. The thing to be judged—a complex of administrative activity, organization and reward—is not known of itself by even educated persons outside the department. We have already seen that Parliamentary Committees cannot adequately judge and criticize the work of Civil Service departments without special coaching by members of those departments. Within each department there is an intricate texture of duties, rights, sub- and super-ordinations, co-ordinations, all the expressions of a single design, and no one part is properly explicable and comprehensible without knowledge of and comparison with the rest. Some things, then, are left to the final judgement of the Disciplinary and Departmental Authorities, and these things the Courts take as unquestionable data. These are: (*a*) whether and from what time an official is to be excluded from his situation (this is a definite and special disciplinary measure, the law of which, though decided by Disciplinary Courts, is well grounded, publicly known, and made only by set forms and principles), but the Courts can ask whether a notice of dismissal is appropriate to terminate the service. They are concerned, properly, with the external form of such decisions, the competence of the particular authority to make them, and whether a legal ground for such a decision exists; (*b*) whether an official has been justly 'seconded' out of the Service (this again is regulated by just norms), as, for example, when a Department has been reorganized, or when a Department has refused to allow 'seconding' because it believed the official wished to retire on political and not on economic grounds; (*c*) whether retirement must be demanded owing to incapacity—that is, there is no appeal against the judgement of incapacity, nor is there one against the decision that the official is still capable of carrying on his duties; but the Court is competent to decide the extent of the pension, once those other decisions have been duly made by the proper authorities, and this competence opens up a variety of powers—for how the incapacity came about, whether by accident or by the official's fault, and so on, affects the judgement as to the pensionary compensation; (*d*) whether an official is to be suspended; (*e*) whether refusal of pay is well founded according to the Act Relating to Breach of Official Duties (1851).[2] The judges

[1] Loc. cit., p. 405.

[2] *Über Dienstvergehen der Richter* (7.5.51), *und der Nicht-richterlichen Beamten.*

must have regard to all the laws and regulations in force at the time of the claim in dispute.

These are the limitations upon the judicial authority of the ordinary Courts dealing with pecuniary claims of officials. There are no other limitations. As to the principles of judgements, they are inspired by a deep knowledge of the constitutional and administrative law. In this aspect of social life German judges have been strongly influenced by the theory of the *Rechtsstaat*: the 'State founded upon Law', which grew up in the nineteenth century as the German substitute for democratic government. If the monarchy was to continue to exist, it could not be tolerated in any but a constitutional form, that is, it must at a certain point of time be bound to principles of justice and conform to them subsequently. It is true that the necessary foundations of monarchical authority imply subordination in no wise necessary for the efficiency of the services to the public, and it is likewise true that this instinct of subordination influenced judges as well as Ministers and legislators—for all come from substantially the same schools and social classes. But the idea of the public good was also strong, and the depth of law training did not allow the notion of justice to succumb before that of subordination. Thus, the Courts have been the upholders of official rights, if not out of justice for the officials, at least out of the realization that justice to officials serves the welfare of the State. The proof of their justice lies in the substance of the rights they have accorded. They are easily observable, for the literature thereof is immense. It is material to recall in this regard the demands of the law teachers and administrators that the law training in the Universities should be mixed with more study in the social sciences than now pertains. The intention, it will be recalled, was that the lawyer should become aware of social realities like the struggle and interaction of social groups: and life was to be prior to formality.

Disciplinary Procedure. We have several times referred to judgement given in the course of disciplinary procedure, and said that these judgements are unquestionable data for the ordinary Courts in pecuniary claims. We shall now analyse the machinery and principles of this procedure. And first, a word as to the character and purpose of disciplinary law. Its foundation is a sweeping definition of duties. These we have already enumerated and discussed. On this foundation it is possible to determine, in the words of the Law Relating to the Breach of Official Duties of 1851,[1] 'if an official has violated his duties imposed upon him by his office, or by his behaviour inside or outside the Service shown himself unworthy of the respect, dignity or confidence demanded by his profession.' Disciplinary penalties are prescribed; they are in ascending order of gravity: Warning, Reprimand, Fine, Suspension and Dismissal. But it should be

[1] Art. 1, Clause 1.

observed that any complete description of misdemeanour is impossible, and experience has shown that those which have been described need elastic interpretation if they are to include many breaches of law which arise in practice.[1] The lighter penalties are summarily decided by the official superiors; the graver ones take place after a formal procedure. It is maintained by various authorities that this procedure and the law upon which it is founded are in no wise of the nature of a special penal law for officials, nor are the penalties those of a like nature to criminal penalties. Fundamentally disciplinary law is calculated to regulate possible penalties in the interests of the official; to safeguard him from arbitrary treatment.[2] But not all authorities agree with this interpretation.[3] It is obvious that disciplinary law does have a punitive effect, and it is intended to have this effect. Where the difference of opinion arises among authorities it is not upon the psychological effect of the penalty once it is formulated, but upon whether the State is a bestower of rights upon the official, or whether the official is entitled to these rights, whether or not the State accords them. Those who take the former view, like Arndt, hold that disciplinary law is a protection to the official, differentiating him from the ordinary employee who can be dismissed on the spot. The latter view is taken by people like Jellinek, who argue that the punishing power of the State is not *ab origine* unlimited. Arndt further remarks that the disciplinary law is *corrective* since it wipes out misdemeanours which do not come within the field of criminality; and *purifying*, since it rids the Service of vicious elements. Whichever view we like to follow in this legal argument, one thing is clear: that the State, like any employer, manager or foreman, must have some disciplinary power, and that, among the various states in the modern world and at the present moment, it is a matter for agreeable surprise that at least one has established publicly-proclaimed principles and special machinery to administer this disciplinary power. For publicity enables the aspirant Civil Servant to calculate the advantages and disadvantages of his career, and the procedure enables him to challenge a wrong. Secrecy, on the other hand, gives rise to insecurity, and lack of public means of redress leaves open the way to all kinds of injustice and petty acts of personal spitefulness. This is the situation in Great Britain, France, and the U.S.A.; but in Germany, for the more serious penalties, at least, there is the power of contest in open courts.

The charge made against an official and the penalty imposed upon

[1] Brand, p. 571.

[2] Arndt, *Das Reichsbeamtengesetz vom* 1873, Edn. 1922, p. 102, Note 1. Also Rehm, *Die Rechtliche Natur des Staatsdienstes* (in *Hirth's Annalen*, 1885, p. 191); Laband, op. cit., 5th Edn., Vol. I, Sect. 48, and Brand, op. cit., p. 570 footnote.

[3] E.g. Jellinek, p. 203, *System des Subjektiven Rechts*, and Giese, *Kommentar*, Art. 129.

him cannot be and are not strictly defined. For some breaches of discipline there are correlated penalties, but there is no exhaustive list. Much must depend upon the nature of the act, the circumstances surrounding it, the record of the official. The law therefore does not take away from the freedom of the superior to decide whether there is a breach of duty, and which penalty is appropriate to the case—or rather, not to the case, but to the *man*. The whole behaviour inside and outside of the Service is to be taken into account.[1]

The Penalties. Penalties fall into two great categories. The first may be translated as Penalties securing subordination (*Ordnungsstrafen*); the second class is that entailing Disciplinary Procedure. In the first category fall the trinity, seemingly inseparable in all discussions: Warning, Reprimand and Fine. In the latter, transposition into another situation, with diminished pay (and (or) loss of cost of removal), or dismissal from the Service. Which of these penalties is invoked depends upon the gravity of the offence, and this is measured by the interests which have to be safeguarded and the disadvantages arising out of the offence. The project for a Reich Disciplinary Order [2] considers a number of cognate offences as a single breach of duty to be penalized as a single breach. There is, further, a class of disciplinary measures which are not considered to be disciplinary penalties, such as admonitions, correction (*Zurechterweisung*) and reproofs. These are of the nature of 'heart to heart' talks, and it is clear to any one with any experience of public or private administration that if these were made the subject of a formal procedure and appeal the whole of civilization would stop, while the world would be given over to litigation.[3] We must also exclude from present study the arrangement known as Compelling Penalties (*Zwangsstrafen*) which are imposed where a specified duty is expressly ordered to be carried out within a certain time, and the official defaults. This form of order and penalty, and disciplinary procedure, are two totally separate matters.

The penalties which fall in the two main categories we have defined are treated with a wealth of detail in the laws and regulations and in judicial decisions. These details, who is permitted to impose penalties, the extent of these penalties, especially of the fine, how far dismissal can be mitigated by modification of the full loss of all pecuniary rights, and so on, are of great interest, but we cannot enter into them here. It is enough for our purpose - the study of the legal guarantees for

[1] *Oberverwaltungsgericht*, Vol. 32, p. 431.

[2] Cf. Appendix to Schulze-Simons, *Rechtsprechung des Disziplinarhofes*.

[3] The line between the lighter penalties and the mere admonitory proceedings is hard to draw. Cf. Brand, p. 586, who remarks that beyond the Minister of the Department there is no appeal against reproof, that this can be as wounding as a 'reprimand', that the superior is therefore able to avoid any action against him by 'reproving' instead of 'reprimanding', and the law is to this extent, insufficient.

Civil Servants—to observe that the whole subject is regulated with the greatest explicitness. There can be no mistaking the nature of the rights, obligations and guarantees by the superior, the subordinate, or the Disciplinary Court.

Procedure. Before we proceed to an analysis of the procedure in disciplinary cases, the relationship between criminal procedure and disciplinary procedure must be explained. It is possible that an official, in the course of his official duties, may commit an offence which is not only a violation of the official code, but also a violation of the criminal law. For example, there may be embezzlement, or forgery, or falsification of official registers. These crimes are punishable by various articles of the Criminal Code.[1] What is the relationship between the two codes of conduct? Each is entirely independent of the other. For convenience of the Disciplinary Judge, and to safeguard the interest of the official, who would have to submit to a double questioning, the criminal proceedings are used as a basis for the disciplinary judgement. This does not betoken the dependence of the Disciplinary Courts upon the Criminal Court proceedings and judgement. It is arranged that the criminal proceedings shall come first, that disciplinary proceedings shall not commence until a decision has been given, or if they have commenced that they shall cease.[2] If the criminal courts acquit the defendant, disciplinary action can be taken against him only for official offences revealed in the course of proceedings *other than that with which he was charged and for which he was acquitted.* This saves a double trial, and avoids a possible contradiction between the Courts. For example, the official may have been acquitted of stealing, but the evidence may show that he foregathered in disreputable public-houses with shady characters. Embezzlement may not be proved: but a condition of inefficient accountancy may be revealed, and disciplinary procedure may be taken against this. Where the criminal court convicts an official, and the conviction is not such as to result in dismissal, it is left to the discretion of the *departmental authorities what disciplinary action, if any, shall* be taken. A very controversial question is, how far the disciplinary authorities are bound to accept the judgement as a finished product to which they can attach their disciplinary penalty without a full inquiry? It is an important practical question since in numerous cases criminal procedure precedes disciplinary procedure. The most learned opinion,[3] at least, holds that the disciplinary judge is not bound in any way to the judgement of the criminal court. This, of course, does not hold good in those cases where the law definitely prescribes that certain criminal judgements are followed automatically by loss of office.

[1] Arts. 331–59, *Strafgesetzbuch*, 'On crimes and misdemeanours in office.'
[2] Brand, pp. 620–4. [3] Brand, *op. cit.*, *pp.* 630–2.

Procedure in Disciplinary Penalties by way of Simple Subordination. There is no special procedure prescribed for these. The procedure is left entirely to the superior officer who is at once accuser, investigating officer, advocate and judge. Custom demands the most conscientious performance of this duty, and exonerating circumstances as well as convicting ones must be taken into account; the Project of the forthcoming Reich Disciplinary Order expressly requires this.[1] Evidence is rarely taken on oath. The official need not be heard before judgement is made, but it is usual to give him the opportunity, and the projected legislation arranges for this.[2] The Staff Committee need not be consulted except when the official charged is a member of it. The decision must be given in writing; under no circumstances will the Prussian Supreme Administrative Court allow a verbal rendering of judgement.[3]

Appeals are allowed, within the specific Department, by prescribed stages, up to the Minister of that Department. There is no time-limit within which such appeal may be made—and perhaps this is an unnecessary liberty, since an appeal made after a long lapse of time cannot properly recall the full details and spirit of the original misdemeanour and judgement. The official, under the existing situation, has the liberty of knowing that after a long time he may appeal, or be appealed against, with the result of a diminution or increase of his penalty. It is now intended to reduce the period to one week.[4] Every superior officer in the hierarchy has the power by virtue of his office to re-investigate, amend or quash the orders or disciplinary decisions of a subordinate. The tendency is for the official not to appeal lest worse befall him.

Elaborate Disciplinary Procedure. This is followed when the end may be exclusion from office, whether it is merely punitive, or total dismissal.

The immediate superior gathers the information necessary to decide whether this procedure can properly be adopted. The official can be compelled to give information which may be against him. Certain authorities then discuss the opening of the procedure and an investigating officer is appointed. This is done, as a rule, by a head of the Department or by the Minister. There are exceptions for various cases and for local government, but they do not offer any peculiarity of principle which we need notice. The declaration of the commencement of the procedure contains the charges in detail and a summary of the situation. This gives the official the opportunity of early information and enables him to prepare his defence. The Investigating Officer (*Untersuchungs-kommissar*) is, as a rule,

[1] Clause 35, Sect. 1, *Entwurf einer Reichsdienststrafordnung, Drucksache des Reichstags*, No. 1474, 1924/5.
[2] Ibid., Clause 34. [3] *O.V.S.*, Vol. 79, p. 425. [4] *Entwurf*, Clause 38.

chosen from among the officers who belong to the field of activity of the Department conducting the case. There is no appeal against his selection. His powers are of a judicial nature, and he automatically assumes the rights and duties of the Investigating Judge in ordinary criminal procedure.

The purpose of this Pre-Investigation (*Voruntersuchung*) is to protect the person charged against an insufficiently careful inquiry into the charges against him. He is given the fullest scope for defence, and every manner of relevant fact is introduced to support the discussion and illumination of the case. This part of the procedure is not regulated in all particulars, and the custom is to use the rules of Criminal Law Procedure in the matter of obtaining statements, the swearing of witnesses, experts, the process of search, compulsion to give evidence, and so on. All this care is the more important since the material accumulated forms the basis for deciding the question whether the charged person is to be freed from prosecution, or to be incriminated and invited to the main proceedings. It is clear that this Pre-Investigation is the centre of gravity of disciplinary procedure. In order to avoid duplication of evidence, with its inconvenience and costs, as much as possible is done at this stage. Indeed, if this stage shows any irregularities of procedure the whole proceedings are invalid.[1] The official is informed personally that he is going to be charged; and necessary details as to the defence are communicated to him; he must, particularly, be informed of those charges which may entail the loss of pension rights. This information can be given by a subordinate of the Investigating Officer. The presence of both Investigating Officer and the prosecuted is important at this hearing, but if the latter does not appear the investigation proceeds without him, unless he is physically or mentally incapable of appearing, when the hearing may be put off. There is a curious lacuna in the procedure: at this stage, which is admittedly of cardinal importance, counsel is not allowed to appear for the official. This is strange, since the procedure is complicated, and in some cases the Public Prosecutor may have been called in by the Department. Though he is bound to fairness to the official he can hardly be expected, having regard to the nature of his office, to advocate the official's cause with the same verve and point as a special defending counsel would do. Counsel are only allowed in the main proceedings. But the projected legislation extends this to the preliminary stage also.[2]

A record, it need not be completely verbatim, of the evidence, and documents collected during the investigation, must be communicated to the prosecuted official. With this communication the first part of the procedure ceases, and the second stage of the Departmental pro-

[1] *O.V.S.*, Vol. 12, p. 430; Vol. 16, p. 398. [2] Clause 46.

cedure, the Main Hearing, commences. When this is concluded, the Disciplinary Courts become competent.

The Main Hearing (Oral Proceedings). The Investigating Officer sends the records to the prosecuting authority. The Minister of the Department can, on the basis of this report, order the cessation of the prosecution, and direct no penalty at all, or one of the lighter penalties. This decision is at the full discretion of the Minister, although it is a convention that only official, not political, grounds shall prevail; and it cannot have effect once the matter has been brought before the Disciplinary Courts. If the prosecution is not stopped at this stage, an official of the Public Prosecution Department prepares a Memorandum of Charge which is the basis of further procedure and defines the proceedings and the decision, and is communicated to the official charged, as an essential part of the procedure next to take place. The session of the oral proceedings is set at a point which will allow the official to prepare his defence, collect necessary information, and brief a lawyer. No other people can be present at the proceedings except the principals and their legal representatives.[1] The defendant has no *right* to an examination of the record, but as a rule this is accorded him. But he has a definite and constitutional right to see his personal records. This right is given by Article 129 of the Constitution, and we shall have more to say about this later in the discussion.

A Reporter is appointed by the Department or Local Authority having jurisdiction, and the proceedings are opened by his description of the situation. After this the prosecuted official is heard, and he may deal not only with the charges, but with the personal circumstances relevant to him. Then the Public Prosecutor puts the case *for and against* and suggests the appropriate judgement. The defending lawyer then has the last word. Whether extra evidence is necessary is a matter for the discretion of this Court. Cross-examination for the defence is at the discretion of the presiding officer. The Court, consisting only of those who have been present at the hearings, then pronounces judgement, whereto it takes into account the whole of the proceedings and evidence; and the independence and integrity of the judgement, on public grounds, are hedged around with ample rules and guarantees. The judgement is given with reasons which must explain what facts were proved and what grounds dictated the punishment. The judgement must be published in writing within eight days after its pronouncement.

The Courts. The Courts of Prussia for the proceedings we have described are: (1) for officials nominated or approved by the Government or the Ministers, the Court of Discipline in Berlin (*Disziplinarhof in Berlin*), and (2) for other officials the great local

[1] Brand, p. 664, for arguments for and against publicity of proceedings.

authorities: the Provincial Authorities. In the latter, it is too often possible for the superior officer of a prosecuted official to appear as a member of the Court, sometimes even as its president. He may have commenced or co-operated in the proceedings leading up to the hearing. Projected legislation excludes this for the future.[1] A process of necessary devolution obliges some special classes of officials who should, according to the classification given above, come before the Berlin Court, to appear before the Provincial Courts. *The Court of Discipline* consists of a President and ten other members of whom at least four must be members of the *Kammergericht*. The other members are taken from various branches of the Administration in such a way that there shall be available for service on the Court a panel of members expert in the main branches of government. These non-legal members are chosen from assistant secretaries and members of the Intermediate and Lower Divisions of the Service. The members of the Court are appointed for three years and are re-eligible. The Court sits with seven members of which two must be members of the *Kammergericht*.

The Provincial Courts consist generally of the Executive Committee, in special session and composed of seven members: the *Regierungspräsident* as Chairman, the *Regierungsvizepräsident*,[2] the Chief Permanent Administrative official of the branch in which the disciplinary offence has occurred, and five other members chosen specially by the President from among the members of the Regierung. These Courts and any individual members thereof may, upon application to the Court of Discipline in Berlin, be declared incompetent, if the prosecuted can objectively prove that they are prejudiced. An appeal lies from these Courts of first instance to the Court of Discipline in Berlin, which is thus at once a court of first instance for some cases, and a court of appeal for others. From this there is no further appeal. Local officials can appeal from the local administrative authorities to the Supreme Administrative Court.

From the Court of Discipline itself the Minister of State is the only Court of Appeal. Either official or Public Prosecutor may make an appeal. Appeals may be lodged against the whole judgement, or merely against the penalty, and the Public Prosecutor may in the interests of the Service, appeal in order that an official may receive a more favourable decision than was given in the court of first instance. In any case, the appeal court cannot make the decision more unfavourable. Arrangements are made, of course, for appellant to notify the Court and the other party of the grounds of appeal.

The costs of proceedings and appeals are borne as follows. They

[1] Entwurf, loc. cit., Clause 44.

[2] The permanent officials of a great local government district subordinate to the *Provinz*.

arise only in formal disciplinary proceedings and appeal cases; in these cases there are expenses postal, clerical, and for witnesses and experts. In Prussia, the Civil Service law does not state how these costs are to be divided, and the procedure at criminal law is followed with appropriate modifications. Acquittal means that the State pays; conviction that the official pays the expenses directly incurred, even the daily expenses and travelling expenses of the Investigation Officer and the Public Prosecutor. A controverted point is whether the State should pay the costs of defending counsel when the defence has been successful. The Reich Disciplinary Court allows this. The Prussian law and the Supreme Administrative Court do not, since they hold that a counsel is not a necessary expense—a piece of authoritarian pedantry. The costs of the preliminary gathering of evidence before the Pre-Investigation is in any case borne by the State. In appeal cases the costs are borne by the loser; where both parties have appealed without an alteration of the judgement, both bear one-half the costs. If the official is acquitted on appeal, both the appeal costs and those of the original proceedings are borne by the State. A reduction of the penalty on appeal is followed by the payment of the costs of the appeal by the State—this is the practice of the Reich Disciplinary Court, but the Prussian Supreme Administrative Court is not so liberal: if the State wins an appeal, then the official must bear the costs of the proceedings in the first instance as well as the appeal costs.

Survey. We have been obliged to enter into what may be deemed unnecessary detail in order to show the extent to which the German Civil Servant is provided with proper securities against unjust treatment in regard to his pecuniary claims and the disciplinary penalties to which he is liable. But it is only in these details that the guarantee lies; not, of course, in default of a spirit of justice, for that is indispensable, but the spirit of justice is an errant and vapour-like entity until it is fixed in forms and institutions. Enough of these exist to make the career of a German Civil Servant safe and secure while his behaviour is of average quality. No one can read through the leading decisions of the Prussian Supreme Administrative Court, the Court of Discipline, and the Reich Court of Discipline, and mistake the genuine desire for fairness to official and State. This is not to exclude the judgements of the Courts which act in the Provinces and the smaller local government areas: but I have not read these, and cannot speak of them first-hand. The temper and the erudition of these Courts are easily equal to those of the ordinary British Courts of Justice: and they are without any doubt, in their own field, more acutely aware of the nature of the peculiar problems brought before them, and have an equipment of administrative as well as judicial lore better fitted to these cases than are the ordinary British Judges.

For Justice is a relative thing, and to be justice it must assume a different shape, a different incarnation, for each field of life to which it is applied. The will to be just may be sound, and learning may be deep; but what if the judge has been trained in a branch of law which has no contact with the realities of administration? The judge is obliged to return to principles of common sense. But, though this phrase has a great allure for the general public (since this, as a rule, has nothing *but* common sense, even if it has that), and though it has significance when the common sense is that of a person of high mental quality, common sense cannot be entirely trusted in technical matters. The issues can only be known to common sense if the issues have been studied.

Whatever the shortcomings of German administrative justice, and they are by no means so many or so grave as British writers pretend when they are praising British methods, it provides a system of legal redress open to all State workers, even the humblest; it has acknowledged that the State may do wrong and it has obliged itself to admit its wrongdoing in just institutions. No other country approaches this in this respect. The nearest to it is the democratic Commonwealth of Australia.[1]

Personal Records. One great gain produced by the Constitution in the matter of the rights of Civil Servants, is the abolition of the secrecy of Personal Records. In a previous chapter we showed how the Prussian Civil Service of the nineteenth century was kept in a state of grovelling subordination by the institution of Secret Personal Records. The constitutional movement of 1848 resulted in a decree abolishing these secret records, but they continued to be used in spite of this. Administrative practice included the communication to an official of any unfavourable report, but no right to the examination of these records existed, and there was no guarantee that what was communicated was the whole or only a part of the truth, or whether it at all corresponded to the written report. This was not enough, and the National Assembly of 1919 included a guarantee of publicity of the Records. This spirit entered the report of the Constitutional Committee in a not very strong form.[2]

'In the Report (*Nachweise*) upon the character (*Person*) of the official, entries of an unfavourable nature to him are only to be made if the official has been given an opportunity of discussing them. The entry is to be communicated to the official.'

This was not satisfactory to the great associations and an amendment put by a Social Democrat was accepted.[3] His argument ran:

[1] Cf. *Annual Report of Public Service Commission*, and Report of Inquiry into the Public Services, 1922.

[2] Article 127.

[3] Cf. Heilfron, VI, 3971.

'If one knew how easy it is to injure an official for the whole of his life and for the whole of his official career, by an unfavourable report, an unfavourable remark, if one has ever seen how officials feared the invisible foe but were without defences against him, how they took the greatest trouble to avoid such a report, but could not do so—then one may understand that they desire to be able to justify themselves against such secret charges.'

The Article finally adopted, Article 129, contains the guarantee:

'In the report upon the person of the official, entries of facts unfavourable to him can only be made if the official was given an opportunity to discuss them. Officials are to be accorded an examination of their personal records.'

The final sentence has provided the official with ample safeguards, and its meaning has been quite liberally interpreted by the Reich and Prussian Governments.[1]

'The right of examination is unlimited; it is a *personal* right and no representative can exercise it without express permission by the Department; Personal Records must be taken to include records relating to subsidiary records of disciplinary proceedings, and the *copies* of remarks and results of examinations: the records must not be marked with secret symbols. Convenient access to the records is to be arranged, but where any travel is involved it is not to be borne by the government; and examination is to take place in the presence of an official appointed by the Department. The knowledge obtained by the examination must be used for no other purpose than the defence of the official's personal rights. What the superior thinks of the official, that is, an estimate of significance of the fact, is not a fact in the sense that it must be communicated.'[2]

Thus is ended a means of subordination which began with the 'spies' appointed in the seventeenth century.

It is an interesting symbol of the decline of the absolutist State which is still in more respects in our midst than we ordinarily have time to observe. It is part of that great movement which in the course of the last century has tended to cast out Fear and Arbitrariness from the inner operative soul of government and to replace it by Publicity, Challengeable Rules, and such a respect for personal rights that the motive 'in the Public Interest' is not perverted to personal animosities and lust of power.

[1] Cf. *Richtlinien zur Einsicht in die Personalnachweise*, 20 March 1923, *Reichsbeamtenblatt*, p. 272, and *Preussisches Beamtenblatt*, p. 161, 20 February 1926. Cf. also Falck, *Die Personalakten*, 1928.

[2] Reich Ministry of Finance, 22 February 1924, *Reichsfinanzblatt*, p. 141.

CHAPTER XXXVI

LEGAL REMEDIES AGAINST PUBLIC ADMINISTRATION, AND ADMINISTRATIVE LAW

THUS the State is continuously managed by a vast body of professional expert servants who contribute to the foundation of law by their technical assistance and who are employed to carry it out. There resides in the legislature, and ultimately in the electorate, the power to correct error and vice in either of these functions, but as we have seen, they are far too cumbrous to be relied upon to deal with a succession of individual cases—various in character and extremely complicated in substance. They have neither the machinery, procedure nor capacity adequate to such judgement. If abuse of power is to be corrected, the specifically appropriate court of judgement and procedure are necessary.

The remedies available to the public to compel Civil Servants to do their work in accordance with law—which is a slightly narrower field than that indicated above—are regulated variously in different countries. Their importance has come into startling prominence since one by one the consequences of the growth in State activity have become clear; in France and Germany, for example, the bases of the present arrangements were laid down between 1870 and 1880, and have only been developed in recent years. The issues raised, and still the subject of agitation, are: How can officials be restrained from *illegally commanding, and forbidding, or executing acts*; how far ought an official to be suable in his own private fortune, and how far should the State be responsible for breach of contract and wrongful acts in the course of official duties? and before what courts should such issues be judged?

These again arise from two considerations: the first from the financial inability (usually) of the average Civil Servant to pay compensation adequate to the damage done. The second consideration is more complex: the Civil Servant has duties of a peculiarly difficult nature, many of which (*a*) from technical considerations, involve *immediacy* of judgement, so that speed, for example, which may be the essence of success, may cause misjudgement, and (*b*) involve always the inevitable decision in favour of some individuals or social groups to the disadvantage of the property and amenities of others.

Either of these may land a Civil Servant into trouble with some individual or group of citizens, and judgement of the legal rectitude of the action taken, which is the only point at present under consideration, should, if it were to be just, be undertaken only by those trained to an appreciation of the nature of the tasks, the functional responsibility, and the mentality of the official, judging by a procedure and with the statistical and documentary equipment appropriate to the issue.

The possibilities of official misbehaviour are multitude: power may not be used when it should be used; an official may go beyond the power granted by law; power may be deliberately or unconsciously perverted to ends having nothing to do with the public service; accidents may happen in the course of a proper use of power to the detriment of citizens quite detached from the event; or improper procedure may be adopted in the practice of official judgement; or commands and prohibitions may be uttered without basis in law. Against these the citizen demands a defence and remedies; and these should be specifically appropriate to the cases which occur, regard must be had to the nature of official duties, while to rely, in cases of compensation, upon the pocket of the official only, is to rely upon a vacuum.

The state of the law varies very much in different countries, owing to the peculiar constitutional history of each. England, which is so excellent in other things, is in this respect defective, the U.S.A. is little better, while France and Germany share the most honourable position.

ENGLAND

(1) The central authority, as a public institution, is not suable for tortious acts at all, and for breach of contract only by a favourable answer given to a Petition of Right by the Attorney-General. The legal grounds of this immunity reside in the feudal foundations of the doctrine that the king can do no wrong, and hence, cannot wrongly choose or instruct its officials.[1] Therefore, in the matter of tort, liability is upon the individual officials and suit is in the ordinary courts and by ordinary procedure since no others have been established expressly for this purpose. As regards contract, the proper entity to be sued must be carefully searched for in a multitude of legal hiding-places, and even when discovered the Crown may, and does, defend itself, by a dozen or so unconquerable weapons of procedure.[2] Broadly, then, the State has created for itself a privileged position

[1] The early history of the doctrine can be traced in Ehrlich, *Proceedings against the Crown*, 1216–1377 (Oxford Studies), VI; Pollock and Maitland's *History of English Law*, I, and Holdsworth, Edn. 3, III.

[2] Robinson, *Proceedings against the Crown*; Holdsworth, 'History of Remedies against the Crown', *Law Quarterly Review*, Vol. 38.

regarding contract, with no basis of modern utility, but, on the contrary, considerable public disutility in which claimant groups are unreasonably penalized.[1] As regards tort, whatever remedy is available is available only against the individual official directly responsible for the act, and this is entirely inadequate in terms of compensation to the grieved person, and may sometimes be unfair to the official acting under administrative stress. The reason which has been given for the maintenance of this situation is that it places full responsibility on the official. This is true, though whether the psychological effect is always present, or always good, is a matter of considerable doubt; but the question arises, ought all the responsibility to be so placed? This question has not yet been answered.

(2) A statute can make the Crown liable, but only by 'express mention or necessary implication'. Many statutes have been invoked as 'necessarily' implying the Crown's liability—without success, because the Act is '*a general enactment of the character of those enacted for the public safety*'[2] and the Courts have very strictly defined the term 'necessary'. This means that the servant, *in so far as he acts in an official capacity*,[3] is immune from suit under such Statutes.

(3) Local authorities, as corporations, are assimilated to natural persons, and are, therefore, in relation to their own servants, in a condition of master and servant, and are liable. However, the extension of central powers has caused the local authorities to become, in certain matters, plainly an agency of the central authority, which so settles the terms of recruitment, dismissal, payment and work that the service relationship is construed as one between the central authority and the servant. The result is that the central authority is immune from liability, the local authority is relieved of it, and the only recourse is against the official individually.[4]

(4) Officials enjoy certain common law or statutory immunities

[1] In 1822, Dallas, C.J. (*Gidley v. Lord Palmerston*, 3 Brod. and B 275), attempted to base the ministry of the servants of the Crown on this reasoning: 'On principles of public policy an action will not lie against persons acting in a public character and situation, which from their very nature would expose them to an infinite multiplicity of actions. . . . The very liability to an unlimited multiplicity of suits would, in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself.'

[2] Lord Alverstone, C.J., in *Cooper v. Hawkins* (1904), 2 K.B., 164. Cf. Bonn's *Abridgment* (1832), p. 462: 'Herein a general rule hath been laid down and established, viz., that where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein. But where a Statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, in such the King shall not be bound unless the Statute is made by express words to extend to him.'

[3] Note the distinction between 'performing public duty', and 'his act'. J. Wills in *Cooper v. Hawkins*.

[4] Cf. Robinson, *The Legal Liability of Public Authorities*, p. 4 ff.

from action: so police officers, executing a warrant regular on its face, customs and excise officers in the conduct of a search; so, in the delimitation to six months of the period within which actions for tort in the exercise of a *duty* (not a power) against all individual officials (*local or central*) who are liable;[1] nor is there an action against a superior officer for the faults of an inferior officer unless the faults are clearly the act of the superior servant.[2]

(5) Officials of the Crown, that is, broadly, the officials of the central authority, have no rights in relation to their place or salary. This subject we have already treated.

(6) Local authorities and central authorities are amenable to action in the ordinary courts to compel them to undertake their specific duties, and to question the legality of actions undertaken.

Thus, in England there is for a large sphere of public administration in the central authority and under its close control, no redress in tort against the State, but only against individual officials. Their wrongful acts, further, are protected by certain limitations and permissions. Any suit, moreover, is heard and decided by the ordinary courts of law. But in contract cases the citizen is badly hampered against the Government.

Is this adequate to modern necessities? The placing of liability upon the individual servant is commonly defended on the ground that the servant is thus made careful, and that if the liability were placed elsewhere a salutary check would be removed. There is some truth in this; but it omits the consideration that it is possible to devise a system whereby the injured citizen may be adequately protected by the right of suit against a wealthy authority, and responsibility of the official maintained by the power of disciplinary action, which can be so arranged as to divide out the capricious personal element from the unavoidable service-element. This is done in France and Germany, as we shall later show. Nor, unless this distinction is made, is the official justly treated.

It is doubtful, moreover, whether, in deciding the legality of a particular action, the ordinary courts are, by reason of their ordinary legal training and composition, able to measure its due content.[3] For interpretations are based on 'reasonableness' and the ingredients of 'reasonableness' would seem to be more truly known by those trained or instructed in the practice of administration. No one will pretend that in many cases the present training in and experience of the law of the ordinary courts produce the proper perception of the process and significance of Government.

In the processes whereby local and central authorities are checked

[1] Public Authorities Protection Act, 1893.
[2] Emden, *The Law and the Civil Servant*.
[3] Cf. Chap. on Separation of Powers, *supra*.

or set in motion, for example, in deciding a *certiorari* action regarding the District Auditor's powers, or in the issue of *mandamus* for the compulsion of local activity, it is possible that the addition of administrative assessors to the ordinary courts would give better results in terms of the just division of burdens and activities among different social elements.

THE RULE OF LAW

Now these present processes represent the contemporary result of what Dicey called the Rule of Law, by which he meant three things (of which only the first two are of importance here): [1]

(1) 'That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.'

(2) 'Not only with us is no man above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.'

(3) The general principles of the Constitution are, with us, the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.

Contrast the outline of official liability and immunities we have presented with the first and second of these principles, and they will be seen to be untrue: in many cases people can be lawfully made to suffer for no breach of the law, for often it is impossible to sue those who have done you damage, and when they are sued they cannot pay the damages, while the distinct procedure in suits against the Crown is sufficient basis for saying that they are not conducted in the ordinary courts of the land—for the ingredients of a court are one part procedure and the other mentality.

Administrative Jurisdiction. Nor is that all, by any means. During the last generation the Departments of State (which are not courts in Dicey's sense) have been made final courts of judgement in regard to many matters which fall within the scope of their work, which are not simply the narrow exercise of clear and indisputable powers, but are actually the construction of the law, an office usually fulfilled by the ordinary law courts. Thus the Minister of Health, the National Health Insurance Commissioner, the Board of Education, the Board of Trade, the Minister of Transport, the Railway Rates Tribunal and other authorities, not being ordinary courts of the land, nor constituted as such, finally decide questions of fact so complicated and disputable as between parties, and thereby affect the person and property of the subject, that justice requires careful precautions.

[1] *Law of the Constitution*, Edn. 8, pp. 179 ff.

Two cases will make clear the kind of power which is vested in the Authorities: *Local Government Board v. Arlidge* (1915), and *Rex v. Electricity Commissioners* (1920 and 1924). In the former case the Local Government Board was given the power to decide appeals from the decision of a local authority to make a closing order if satisfied that a house was unfit for human habitation. It is clear that the administration of such an appeal demands very careful procedure since the facts are technical and complicated, and the result affects the property of the owner of the house and the well-being of the public. Moreover, the fact that there is an appeal gives the court the appearance of a dispute between parties at law, or as the lawyers have it, a *lis inter partes*. The Act of 1909 says no more on this head than that the

'procedure on any appeals under this part of this Act, including costs, *shall be such as the Board may by rules determine*, and on any such appeal the Board may make such order in the matter as they think equitable, and any order so made shall be binding and conclusive on all parties'.

Two provisions follow: that the Board may at any stage, and shall if so directed by the High Court, state in the form of a special case for the opinion of the Court, *any question of law* arising; and no appeal may be dismissed without a public local inquiry being first held.

In the *Arlidge* case, Arlidge, the house-owner, applied for a writ of *certiorari* to quash the order of the Board which rejected his appeal —on the grounds that the appeal had not been determined in the manner provided by the law. The essential issue raised was whether the procedure was or was not 'judicial' in its nature. The King's Bench decided that it was judicial enough, with nothing in it contrary to 'natural justice', the Court of Appeal by two to one, decided against the justice of the procedure because (*a*) both parties (the local authority and the owner) should have been confronted, (*b*) the inspector's reports should have been disclosed, (*c*) the names of the members of the Board who considered the appeal should have been published. That is, they assimilated this administrative action to that of a Court of Justice deciding disputes between parties. Lord Chancellor Haldane, giving judgement in the House of Lords, swept away these considerations and their underlying philosophy. He denied the paramountcy of private property as a right above the social interests involved; and as regards procedure it was sufficient if the Board acted judicially, that is 'without bias, and must give to each of the parties the opportunity of adequately presenting the case made'. The Minister could not possibly be expected to do the work himself but must, and *ought*, to act vicariously through his officials. Oral hearings were not necessary, nor was it correct to speak of the case as a *lis inter*

partes. Beyond that the ultimate controlling authority was Parliament. The judgement was unanimously sustained.

In *Rex v. the Electricity Commissioners* the use of the power of the latter, to formulate schemes for the improvement of the electricity supply and for that purpose to hold inquiries,[1] was challenged in a specific instance. The seriousness of the case arose from the ultimate fact that the Commissioners, on the result of such an inquiry, have the right to recommend to the Minister of Transport, a scheme which after submission to Parliament, and approval with or without amendment, becomes law, compulsory on the citizen.

'Any such order shall be laid, as soon as may be after it is confirmed, before each House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed by each such House, and when so approved shall have effect as if enacted in this Act. . . .'

The Commissioners argued that they were immune from judicial interference because (*a*) they were acting executively, not judicially, and (*b*) that their orders were not valid until Parliament had resolved to accept them, but either before that point, or after it, no Court had a right to intervene and question whether a scheme were within the powers given by the original Act to the Electricity Commissioners. 'On principle, and on authority, it is my opinion', said Bankes L.J. (198 L.R., 1924, I.K.B.), 'open to this Court to hold, and consider that it should hold, that powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially, and not ministerially or merely. . . . as proceedings towards legislation'.

There is a considerable distribution of such power,[2] and therefore Dicey's Rule of Law is, in practice, considerably modified. What is the significance of this power? This, that authorities not specially trained in adjudication, in aloofness, and without, as yet, procedure which leaves no doubts, may take away liberty and property without redress.[3] On the other hand, the Courts are nowadays faced with issues which they are not in a position properly to settle.[4] Yet neither the due safeguard of the individual called upon to surrender in the name of the community, nor the due safeguard of the social groups whom Parliament has decided ought to be benefited, should be unpro-

[1] Electricity (Supply) Act, 1919, 9 and 10 Geo. V, c. 100, Sects. 5 and 6.

[2] Cf. Port, *Administrative Law* (1929); Robson, *Justice and Administrative Law* (1929). For U.S.A., see Dickinson, *Administrative Justice and the Supremacy of Law* (1927).

[3] Cf. Hewart's indictment, *New Despotism*, pp. 43–4.

[4] E.g. *Roberts v. Hopwood* (1925), 41 T.L.R. (444): 'There are many matters which the Courts are indisposed to question; though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of local authorities simply because they are themselves ill-equipped to weigh the merits of one solution of a practical question as against another. . . .'

vided for. The issue seems to invite in many cases a new type of Administrative Court in which the judicially trained and the administratively trained, served by their inquiry officers, and acting under the well-known judicial forms of publicity, record and evidence (with suitable modifications), shall co-operate.

We have already referred to the growing mass of legislation made by administrative authorities in the form of rules and orders, commonly called 'subordinate', 'delegated', 'departmental legislation'. These, again, are at present challengeable for their legality, that is the extent to which they can reasonably be subsumed under the enabling statute, in the ordinary courts, while Parliament can challenge for any reason, including the wisdom of their substance. We have already seen that Parliament is inadequately equipped for this task and discussed the conditions of its improvement. Perhaps the future development of the State will demand that the making of the orders shall occur under a procedure providing for the most scrupulous and careful inquiry, and their challenge shall be undertaken by judges trained in the Social Sciences as well as in law and acting with a full understanding of the total governmental results of their judgement. In France the orders are challengeable, for the most part, before a special tribunal, the *Conseil d'Etat*, whose composition is discussed later. In Germany some are challengeable before the ordinary law courts, but the judge is differently trained from the English—more adequately to such judgement. In America a just procedure is being discovered for the administrative boards which make the order.[1]

The essence of the issues we have raised here is dealt with in the chapter on the Separation of Powers, and only the detailed inquiry now being conducted by the Committee on the Legislative Powers of the Departments can help us to discover the proper machinery for the legislative and the 'judicial' functions of administrative authorities. But the main principles of reform are obvious. Thus England suffers from a system which at any moment may result in serious injustice to the individual, the public, the official. There is no uniformity of principle, for the Rule of Law has been superseded by a number of sporadic and unregulated growths.

Administrative Law. Now we have touched upon a subject of the acutest controversy, but purposely without mentioning the name under which the controversy has been conducted—Administrative Law. For the introduction of the term Dicey is responsible. He borrowed the term *droit administratif* from France and gave it at once an erroneous and a sinister meaning. He takes his definition from Aucoc's *Droit Administratif*,[2] as follows:

[1] We have already discussed the making of these Orders, in Chap. XIX, pp. 866 ff. *supra*.

[2] Dicey, p. 328.

'Administrative Law determines (1) the constitution and the relations of those organs of society which are charged with the care of those social interests (*interêts collectifs*) which are the object of public administration, by which term is meant the different representatives of society, among which the State is the most important, and (2) the relation of the administrative authorities towards the citizens of the State.'

This would seem as clear as any definition can be. But Dicey is determined to find a sinister meaning in it, and therefore says: 'These definitions are wanting in precision, and their vagueness is not without significance.' He then proceeds to discard any comparison of the two countries in 1905, when the edition was written, and, instead, goes back forty years, that is, to the time before France created its modern means of redress against the State and before England began to destroy hers. He soon loses his historical interest, and begins the process of whittling away the borrowed definition until *droit administratif* appears to be nothing more or less than a body of rules for the protection of officials who have committed abuses of power against the citizens—e.g.

'the fourth and most despotic (as though all the others were despotic, though less so), characteristic, etc., etc., of *droit administratif* lies in its tendency to protect from the supervision or control of the ordinary law courts any servant of the State who is guilty of an act, however illegal, whilst acting in *bona fide* obedience to the orders of his superiors and, as far as intention goes, in the mere discharge of his official duties'.

Finally *droit administratif* is made to appear as only, and no more than, the generalizations from the judgements rendered in the special Courts, the *tribunaux administratifs*, for officials in their relations with the public.

Let us be clear, once for all, on the real meaning of administrative law, or *droit administratif*, or *Verwaltungsrecht*. By *droit administratif*, Berthélemy means this:

'All the services which combine to the execution of laws, excepting the services of justice, are administrative services, and *droit administratif* is the sum total of the principles according to which their activity is exercised. It is one of the branches of public law which includes, further, constitutional law, criminal law, and public international law. . . . Constitutional law teaches us the political organization of the State, the distinction between the public authorities, the rules according to which are designated the personages invested with that double function which constitutes the essence of Government: to make the law and procure its execution. *Administrative Law* analyses the mechanism of the Governmental machine. How the machine is constructed is taught by constitutional law. How it works, how each of its parts functions, is the subject-matter of administrative law.'

There is surely nothing sinister in this. It is a little vague, like all definitions, but it is intelligible and not disquieting. In England there is such a body of law: and wherever there is administration

and law there is administrative law. It includes statutes, conventions, and case-law from the ordinary and the special Courts. Other modern French jurists have similar definitions. Similarly with the German synonym: *Verwaltungsrecht*: 'Administrative law . . . is public law applied to the needs of public administration.' Again: 'Administrative law is the legal ordering of the relationship between the administrating state and the subjects met in the process'; [1] and, more fully: 'Administrative law is the law *peculiar* to the relationship between the administrating state and its subjects met in the process.' [2] The subjects treated in these works are the same in scope as in those of the French authors mentioned.

If we take the lands of their origin as legitimately laying down the proper connotation of a term, then the most proper definition of administrative law in English is that by Mr. Port (op. cit. p. 12):

> 'Administrative Law is then made up of all those legal rules—either formally expressed by statutes or implied in the prerogative—which have as their ultimate object the fulfilment of public law. It touches first the legislature, in that the formally expressed rules are usually laid down by that body; it touches secondly the judiciary, in that (*a*) there are rules (both statutory and prerogative) which govern the judicial actions that may be brought by or against administrative persons, and (*b*) administrative bodies are sometimes permitted to exercise judicial powers; thirdly, it is, of course, essentially concerned with the practical application of the law.'

In short, Administrative Law is simply the law relating to public administration.

We have dwelt upon this for two reasons, first to create a standard of criticism of the manner in which the term is used by some authors [3] who use it in the very narrow sense of such 'judicial' action as is carried out by administrative boards and Ministers, and the current popular notion that it means only law made by the departments in the form of rules and orders. These terms are dyslogistic; and therefore we come to the second purpose: to challenge the domination of an erroneous concept which inhibits reformative thought. We can now proceed to discuss those parts of French and German administrative law which correspond to the rules relating to the Legal Remedies against Public Administration so far discussed in relation to England.

FRANCE

The French monarchy of the *ancien régime* drew to itself all suits in which the authority of the Crown was concerned, and it was able to do this because of its centralized strength, and the venal, if sometimes learned, composition of the *Parlements* which caused them to

[1] Fleiner, *Institutionen des deutschen Verwaltungsrechts*, p. 61.
[2] Mayer, op. cit., I, 14; cf. Jellinek, *Verwaltungsrecht*, pp. 39–56.
[3] Dicey, in the past, and by recent controversialists.

be despised by both people and monarchy. By direct assault [1] jurisdiction was drawn into the hands of the intendants and the royal councils,[2] for the express purpose of removing obstacles to administration. Thus an authority, already bloated by centralization, became dangerously engorged by adding judgement to execution; and this, as well as the confusion of functions in the *Parlements*, resulted in the growth of the idea that without the separation of power there was no Constitution. In 1791 the ordinary Courts were forbidden from handling administrative functions.[3] The local authorities (departmental and district) were given ultimate authority in certain administrative actions—direct taxes, public works, municipal activities, and in regard to the acts of local governing authorities (still under the monarchy) annulment by the King after discussion with his Ministers. By the Constitution of the Year III, the final authority of Ministers, individually, in these matters was increased. Thenceforward two tendencies are visible: one, beginning in the Year VIII, of the creation of special bodies to judge administrative actions—the prefectoral councils and the *Conseil d'État* [4] above them and the Ministers, and other, special, bodies to decide such things as compensation to the State for the reclamation of marshes, and the institution of defences against floods, and audit of accounts of public moneys. The administrative jurisdiction of the council increased, and its *Comité du Contentieux*, under the Chief Justice, took charge of it, and the jurisdiction was favoured by reason of its cheapness and promptness. In 1831 the procedure of the *Conseil d'État* was reformed to assimilate its quality to that of the ordinary law courts; (similarly for the prefectoral councils, but not till 1862;) and in 1848 the *Conseil* received the power to pronounce judgements instead of giving advice. Meanwhile their duties were augmented; and as a consequence disputes concerning their propriety arose: the minority before 1830 asserted the necessity of placing before the civil Courts all subjects founded upon the express terms of written law—the Government to be challenged in its own home when acting from discretion. However, the view found no place in law, and was indeed contested by Liberals like Dalloz, Tocqueville, Isambert and Odillon Barrot, members of the Commission of the Chamber of Deputies on the reform.[5] Another line of opposition was followed in the division which we have already indicated between *actes d'autorité* and *actes de gestion*: the former, being of a necessarily discretionary nature, were to remain with the administrative Courts, the latter, of a simple nature, were to be judici-

[1] Tocqueville, p. 66. [2] Dareste, *La Justice Administrative en France*.

[3] '*Les tribunaux ne peuvent entreprendre sur les fonctions administratives ou citer devant eux les administrateurs pour raison de leurs fonctions.*' Cf. Hauriou, p. 945.

[4] The *Conseil d'État* was primarily a legislative body, and a rule-drafting authority: it was also empowered to 'settle difficulties arising in administrative matters'.

[5] Report, Dalloz, 10 June 1840. Cf. Aucoc, *Le Conseil d'État*, Chap. III.

able before the ordinary Courts. We showed, in a former chapter, that this distinction was unsound, and so in a leading case it was declared to be, in the twentieth century.[1] At any rate, the distinction had no practical value until the great reorganization of the *Conseil d'État*, which had been suppressed by Napoleon III, and the creation of the *Tribunal des Conflits* in 1872.

Up to 1872 the *Conseil d'État* had only the right of adjudication in specific cases, in other words, it could not possibly grow beyond the small elasticity of a few granted powers. In 1872 it acquired a general and sovereign authority in administrative actions thus: 'The *Conseil d'État* decides in sovereignty in matters of administrative contentions and upon demands for annulment for excess of power made against the acts of various local authorities.'[2] This is the supreme Court. There are then subordinate bodies in the localities, like the Prefectoral Councils.[3] The *Tribunal des Conflits* decides in which Courts disputed cases belong. Its composition is important: (*a*) the Keeper of the Seals is president, (*b*) three councillors of State in ordinary service elected by their colleagues, (*c*) three members of the Court of Cassation (the highest court of appeal) elected by their colleagues, and (*d*) twelve members elected by the majority of the other members at their complete discretion. Members are re-elected triennially and are continuously re-eligible. This is a body not weighted to one side or the other, and so there can be no suspicion of undue influence on behalf of the Government against the citizen.

The *Conseil d'État* itself consists of a large number of *conseillers, maîtres des requêtes* and *auditeurs*. The first class give judgement, while the two last classes prepare the judgements. The *auditeurs* are recruited by competitive examination from among those with the law degree of *licencié*. The *maîtres des requêtes* are recruited to the extent of three-fourths by promotion from the *auditeurs*, the rest being appointed by the Government at its discretion, while two-thirds of the *conseillers* are recruited from *maîtres des requêtes*, the rest being chosen at the Government's discretion. The appointments at discretion offer a loophole for influence, but in fact convention limits the Government's choice to those high in the administrative service, and this supplies direct experience of administration: further, the *conseillers* are removable, but this does not occur, nor is the independence of this august body at all affected by the possibility. The internal organization of the *Conseil* is not of particular interest here.

The *Conseil*, the *Tribunal des Conflits*, and the Prefectoral Councils, administer between them a branch of law at once cheap and completely defensive of the citizen against injuries by public administration, whether by quashing of improper actions or the grant of damages.

[1] Cf. Jèze, op. cit., II, 237 *note*. [2] Hauriou, p. 945 ff. [3] Ibid.

The results of their judgements are not embodied in a code, though that may one day come, but the rules, taken together, give every individual citizen the right to require the *Conseil d'Etat* to judge the legality and equity of every administrative decision, and to repair monetarily the destructive results of illegal or inequitable action.

We do not intend to pursue in detail the jurisprudence of the Courts, but we simply set out the main conclusions which its activity justifies.

(*a*) 'Let one be guarded against considering administrative justice as "exceptional" justice. That would be to commit a grave mistake and a serious abuse of language. Administrative justice is not a dismemberment of the justice of the law courts. It is the judicial organ by which the executive power imposes upon the active administration the respect for law. The administrative courts have not taken their rôle from the judicial authority; they are one of the forms by which the administrative authority is exercised. To put the matter even more precisely, it may be said that the administrative tribunals are, towards the acts and the decisions of the administration, what the Courts of Appeal are to the decisions of inferior courts.' [1]

(*b*) Since there are some administrative actions which are necessary in terms of government, where a multiplicity of actions is likely, and where, too, the official is involved in the habits and urgencies of a vast apparatus, there must be a limitation upon the power to sue officials personally; [2] and a distinction must be made between acts for which the servant is personally liable and suable in the ordinary Courts, and those which are the result of administrative faults, for which the Service as an entity is responsible. Such limitations and distinctions may be by statute or decree or judgement of a Court. In France, the *Tribunal des Conflits* makes the distinction, and its doctrine is to be found in a series of cases commencing with the *Pelletier* case of 1873.[3] These settle the distinction (from case to case) between *faute personnelle* for which damages can be obtained in the ordinary Courts, and *faute de service* or *faute de fonction* for which a suit lies in the administrative, that is specially constituted Courts.

(*c*) *Faute personnelle* is extremely difficult of definition, but it has been defined by the great French administrative jurist of the last generation as 'that kind of fault which reveals the man with his weaknesses, passions and imprudences'.[4] Duguit gives the formula, 'when the act, accomplished on the occasion of the Service, is, however, an act foreign to the Service, it is called, according to the consecrated

[1] Berthélemy, op. cit., p. 1072.

[2] Cf. Trotobas, 'Liability in Damages under French Administrative Law,' *Journal of Comparative Legislation*, February, 1930, p. 44 ff.

[3] This case was not fought to saddle the Government with fault and compensation, but to guarantee officials against the abuse of the right to sue them.

[4] Laferrière, *Traité*, 2nd edn., I, 648.

terminology, the *personal fault* of the official.' Some samples are: the posting of an electoral list, which was proper to the Service, but the publication of the fact that one man (an electoral adversary) had been excluded therefrom because of bankruptcy; a tax inspector points out irregularities at a tobacco depot (properly) and accuses a boy of theft (foreign to his administrative power); a teacher teaches his pupils to read (properly), and makes revolting remarks about God (that is a personal fault). The distinction is between personal impropriety from pursuit of a wrong purpose, and error due to incompetence and mistake when pursuing a right object. There is a tremendous controversy about the definitions of *faute personnelle* and *faute de service*; we cannot here discuss which of the disputants is nearest the truth; but in many cases the practical distinction is exceedingly difficult.[1]

(*d*) A distinction is made between officials concerned with the handling and responsibility for moneys (*comptables*), who are under an exceptional and severe régime, in which the State accepts responsibility but has a retroaction against the officials who have given guarantees, and all others (*ordonnateurs*) who are concerned by what we have said above and what we proceed to say.

(*e*) An official, in the matter of *faute personnelle*, is not necessarily shielded by the orders of his superiors, but how far the hierarchical authority will wipe out the official's responsibility is settled by the *tribunal des conflits* if that Court is invoked. Allowance is made for the force of the hierarchical bond, and the degree of instruction and intelligence of the subordinate.[2]

(*f*) In pursuance of the doctrine of the separation of powers (here dividing the ordinary judiciary from administration), and the recognition of the special nature of administrative activity, the various kinds of fault and responsibility are receivable by different Courts. Personal faults are judged and decided before the ordinary law courts; service faults before administrative Courts, i.e. in the localities, the prefectoral councils,[3] and the centre, the *Conseil d'État*.

(*g*) The State and the municipalities are responsible, can be sued in the administrative Courts, and may be compelled to pay damages

[1] Laferrière, in 1896, thus distinguished the fault: 'The *faute de service* results from a service badly rendered, an order badly done, misunderstood, imprudently executed, but still having in view the functioning of the service alone; the *faute personnelle* consists of crimes, frauds, grave faults where appear the personal passions of the agent, rather than the difficulties and risks of the function.'—*Droit Administratif*, 2nd Edn., II, 189. In the *Revue de Droit public*, 1909, p. 263 ff., Jèze classifies the cases of personal fault and concludes that they fall in three broad classes: (1) When an evil intention is manifested; (2) a clear violation of a law formally prohibiting the Act; (3) a blatant and abnormal error of the official in the appreciation of facts or extent of legal powers.

[2] Cf. Joseph Barthélemy, *Revue du Droit Public*, 1914, p. 537 ff., *L'influence de l'ordre hiérarchique*.

[3] Cf. for their composition and activity, Berthélemy, *Traité* (1930), p. 1108 ff.

for any prejudice to property or life caused by defective action [1]—for a *faute de service*, that is, as Hauriou says, 'the negligences, the omissions, the errors which are among the habits of the service, when those habits are bad'. In other words, an act sound as regards its purpose, but incompetently performed by a person or body of persons. Indeed, French jurisprudence speaks of a *grave* (*lourde*) fault; the idea being, that it is *beyond the average incompetence* to be expected among the mass of men and officials.[2] Moreover, the fault must be in a special case regarding a special person or persons, not merely the result of the general non-application of the law. Compensation by the State was admitted in the Revolutionary period in regard to property and public works, and is well established in the case of breach of contract; much of that is a development from the guarantee of individual property in the early Constitution.[3] In this background the official may err by *excès de pouvoir*, that is by going outside his legal powers; and one remedy is annulment of the act upon promulgation and before injury occurs (*recours pour excès de pouvoir*), or if the act causes injury there is action for indemnification (*recours contentieux*). There are even signs that in the case of sheer unavoidable accidents, the public authority is responsible.[4] Such are cases where the fault complained of is not simply caused by *force majeure*, i.e. a purely external and totally incalculable and unavoidable factor, but by a fault of the service which cannot in the present state of science be assigned to a specific cause.[5] In such cases the victim is not required to prove or allege a fault of the Service: it is enough that the Service has done *him* damage, that he has suffered as a consequence of an *abnormal* occurrence arising from a Service which the community at large established for the general benefit. So in the dismissal of Civil Servants resulting from the suppression of situations in the Government service,[6] explosion of munition dumps,[7] on board ship,[8] or fire caused by official operations,[9] so omission to lend armed aid to enforce judgement.[10]

[1] i.e. For lack of competence, violation of form, violation of a law, or misuse of power. Précis, p. 374, and Ducz, *La Responsabilité de la Puissance Publique* (1927), p. 16 ff.; p. 23 ff.

[2] Duguit, III, 462.

[3] Duguit, ibid., p. 462.

[4] Duguit, ibid., p. 469 ff.; *Pluchard*, 1909 (*Recueil-Sirey*, 1829), especially general conclusion and notes on p. 470.

[5] Cf. Hauriou, Note to Sirey, 1912, III, 161, on the *Ambosini* case.

[6] *Conseil d'État*, Dec., 1903; *Villenave*, *Recueil*, p. 768.

[7] *Reynault-Desrosiers*, 28 March 1919; *Compagnie P.L.M. Recueil*, p. 354, 26 March 1920.

[8] *Colas*, 21 May 1926.

[9] *Walther*, 24 December 1926.

[10] *Couiétas*, 30 November 1923. Larnaude thus expresses the theory we have indicated above: 'When this vast machine, called the State, a hundred times more powerful and a hundred times more dangerous than the machinery of industry, has injured some one, those in whose interest it functioned when the injury was caused, must make restitution; the principles of solidarity and mutuality upon which our institutions are based, require it.' Cited by Watkins, *The State as a Party Litigant*, p. 148, Baltimore, 1927.

Since 1907 the rules of public administration as well as 'simple' regulations equivalent in purpose, if not in form, to the British Statutory Rules and Orders and Orders in Council are challengeable before the *Conseil d'État*; a seemingly queer arrangement, since it is the *Conseil*, in its legislative aspect, which drafts them. Until that time, though other administrative actions of the executive had been made liable to jurisdiction, this had been exempted, but they may, in certain cases, be challenged in the ordinary Courts.

(*h*) Now, not only is the State prepared to accept responsibility and pay damages for its own faults, but in some cases it pays damages for its officials convicted of a personal fault. This development is of late growth and owes some of its strength to the theoretical work of M. Jèze, who in connexion with two famous cases [1] argued that a personal fault was always graver than a Service fault and that the State should accept liability not on the basis of any fault, but as offering insurance against social risk of damage from the public services,[2] and in 1918, the *Conseil d'État* actually condemned a municipality to pay damages to a person wounded by its mayor in the course of a fête,[3] in these terms: 'considering that the circumstance of the said accident would be the consequence of a fault of an official in charge of the execution of a public service, which would have the character of a personal action of the nature to produce the condemnation of the agent before the law-courts to damages, nevertheless, though such a condemnation were effectively pronounced, it could not result in the victim of the accident being deprived of the right to proceed for the compensation for the injury suffered directly against the *public person* having the management of the incriminated service.' Since then other cases have been fought and decided on the same grounds, though it must be admitted that in these cases both a *faute personnelle* and the *faute de service* were present. The doctrine of *non-cumul des responsabilités* (that is, that only one, either the official or the Service, was responsible, and that if one was sued unsuccessfully, the other went scot-free) has been destroyed. The inevitable has followed, the State has been granted a right of retroaction against an official whose personal fault has involved it in the duty of paying damages.[4]

Yet there are warnings against an extension of this practice, lest the official escape from *personal* responsibility altogether;[5] and in recent cases, according to Duguit, there are grounds for believing that the *Conseil* does not intend such personal immunity.

(*i*) We have already shown how the professional rights and duties

[1] *Revue du droit public*, 1914; and Duguit, *Transformations*, 1913, pp. 274–7.
[2] *Revue du droit public*, V. 31, 586.
[3] *Lemonnier*, 1918, *Recueil*, 773.
[4] Jèze, *Revue du droit public*, Oct., 1924. [5] Duguit, p. 489.

of officials have been included within the jurisdiction of the administrative Courts.[1]

(*j*) Finally, procedure is simpler than that of the ordinary Courts and inexpensive.[2]

Thus we may say that in France, every illegal official act is challengeable either in the ordinary Courts or in special Courts where procedure, composition and doctrine give very generous guarantees that only that will be done which is legal, that only the legal which is done competently and with a proper motive will be permitted, and that a cheap and simple process will cause annulment and produce indemnification by the public authority responsible, and that even a personal fault may in many cases be indemnified by the public authority. One has only to analyse the judgements given by the *Conseil d'État* to realize what remarkable acumen has been applied to the problem of reconciling the process of government with the claims of individuals, and the close connexion between the *Conseil* and the development of administrative science and law by academic masters.[3]

GERMANY

The legal redress of official infractions of the law or maladministration has reached highly systematic and secure conditions in Germany and this seems to be due to three things: the desire to secure a legal control of the administration, where for so long a political control was weak, a special love of law which was signalized by observers centuries ago, and the development of the theory of the *Rechtsstaat*, that is, the State which shall not act arbitrarily, but only in accordance with law and morality. This latter was the contribution of liberal thinkers to German constitutional development. These, until the last quarter of the nineteenth century, sought a solution in the transfer of administrative jurisdiction to the ordinary Courts, using the French differentiation of act of authority and simple acts of administration as a division between what should be left to the departments to correct and what should come before the ordinary Courts, and pressing to its utmost what the German Conservatives had denied: the separation of powers. Indeed, the Frankfurt Constitution of 1849 expressly prohibited administrative tribunals,[4] and Bähr, in his *Der Rechtsstaat* (1864), systematized the current of thought of which this was the

[1] Chap. XXXV *supra*.

[2] See Duez, op. cit., Part III, and Appleton, *Traité élémentaire du contentieux administratif* (1927).

[3] Duez says that the jurisprudence of the *Conseil d'État* tends towards this general formula: 'Every abnormal, exceptional prejudice, passing, by its nature or importance, beyond the general burdens and sacrifices which life in society requires and the peaceful maintenance of that society, ought to be considered a violation of the equality of citizens before the public charges' (op. cit., p. 61).

[4] (Art. 181: Administrative jurisdiction ceases. The Courts decide upon all violations of the law.)

expression. It is to Gneist, the constitutional and administrative historian, that modern German notions and institutions of administrative justice are due, for in his *Der Rechtsstaat* he demanded the creation of special administrative Courts in the localities and at the centre, formed of several members, and in the localities aided by unpaid laymen.[1] This offered the possibility of a reconciliation between the necessities of the administrative services and the need for judicial protection of individual rights, and State after State began from 1875 onwards to construct a system of administrative courts. 'Seldom', it has been said, 'has a single academic mind, by action and writings, exercised so profound an influence upon the reforms of positive law as Gneist in our own days. But it is more political science than jurisprudence which deserves the credit.' The essence was to subject the public authorities to a regular control through special Courts set in motion by actions by citizens, and to give this action a guaranteed basis, not a precarious one as the Police-State of the eighteenth century had, when it of grace permitted actions to be brought by citizens against it in the ordinary Courts.[2] The State was to be subjected to special legal compulsions. Gierke's formula is, 'The *Rechtsstaat* is a State which sets itself not above the law but within it.'[3] The result has been the growth of a system of jurisprudence in every respect honest and appropriate to administration and citizen. We shall consider its salient features presently.

The Fiskus. Secondly, German jurisprudence recognizes the distinction between public and private law, and within the latter an old doctrine teaches the personality of the State as the bearer of rights and duties like any ordinary person, sole or corporate. Now this doctrine of the State's personality may, as Duguit has spent hundreds of pages in proving, have the evil effect of confounding the individuals with the State, and so of making the State almighty. But it has its very useful side in that the personification provides a suable entity: the *Fiskus*. This body, in all the departments of State in which it is resident, has all the rights and duties in contract and tort of an ordinary individual or firm, and the suit lies in the ordinary Courts. This institution arose as a substitute for imperial jurisdiction over the Princes of the various German States.[4] It proceeded upon the assumption that public property belonged neither to the Prince nor the State, but to a person distinct from these—the Fiskus—and its property rights came under the Civil Law, and thence the Fiskus was subordinated to this law on the same terms as a private person

[1] Published 1871; first as an allocation to the jurists who were members of the first German Reichstag.

[2] Mayer, I, 54 ff.; *Deutsches Verwaltungsrecht*, Edn. 3.

[3] Zt. for Staatsw: XXX, p. 13; Mayer's, p. 62. ('The *Rechtsstaat* means the maximum possible legality of administration.')

[4] Fleiner, p. 35 ff. and Gierke, III, 796 ff.

wherever public actions had a property-aspect, e.g. Civil Servant and State, contract between private individuals and the State. The Courts proceeded further and created a doctrine of indemnification for damages to the recognized rights of the subject, and these covered both statutory rights and those of natural justice, 'subjective rights', as they are called in Germany.[1]

In the nineteenth century the liberal movements then went further along the line of the *Rechtsstaat*, to control the complex administrative relationships which were fast developing, while doctrine now identified the *Fiskus* with the State, but only on its property law side, and practice confined this only, and not the new developments, to the civil Courts. In the field of acts of authority by public administration the new Courts, administrative Courts, became the givers of justice.

Let us first consider, apart from contract, legal remedies against public administration, in the ordinary Courts. This can best be done by quoting at length from a fabricated case put by Walter Jellinek.

A visits his sick friend B in the State mental clinic. A nurse brings in hot tea, spills it, and scalds both A and B. For the negligence of the nurse the Fiskus is liable according to private law towards B on the basis of the Civil Code, 278 (1) because the nurse is in service towards him, and towards A according to the Civil Code, 831 (2) only, because between the Fiskus and A there is no contractual relationship. In A's case the Fiskus may plead that in the appointment of the nurse it observed the proper care, while towards B this ground of excuse falls. At the cry of pain from A warders enter and bring him before the head physician (who is employed by private contract). The physician, thinking that the man is mad, commands the incarceration of A in an isolation cell. As the physician has presumably acted negligently and therefore culpably violated the freedom of another against the law (Civil Code 823) and as he is a 'constitutionally deputed representative' of the Fiskus, the Fiskus takes liability for him according to the Civil Code 31 and 89, without having the right to plead appropriate care in the choice of the head physician. The presumed madman is able to get a letter conveyed to the Police-president, in which he begs to be freed from his painful situation. The Police-president does not examine the case at all, but orders (on the contrary) that A must remain in the mental clinic until further notice. Here enters for the first time public law, because here an official has wronged a third person by negligence in the exercise of a public duty entrusted to him. The Civil Code treats this case differently from those previously mentioned. If we were concerned here only with the Civil Code then the official alone would be liable, not the State. Further, in the case of negligence the official is liable only auxiliarly, if, that is, the injured person can

[1] See Georg Jellinek, *System der Subjektiven Rechte.*

obtain no compensation in any other way, and the duty to compensate does not enter at all, if the injured person intentionally or negligently has omitted to prevent the injury by the use of a legal remedy (Civil Code 839 (1), (3)).

The Introductory Law to the Civil Code permitted in Article 77 the separate States to make rules regarding the liability of the State and the local authorities for the damage caused by officials in the exercise of the public authority entrusted to them, with the provision that the State statutes could entirely exclude the direct liability of the official. Many States used this power (Prussia 1909). The Reich had introduced liability for the error of the Land Registry Judge in Clause 12 of the Land Registry Order of 24 March 1897; for its own officials it established the liability of the Reichfiskus by the Law of 22 May 1910. Yet the earlier legal situation is in many ways surpassed by Article 131 of the Constitution, especially by its extraordinary application by the Reichsgericht. The Article runs: 'If an official violates his official duty towards a third person in the exercise of public authority entrusted to him, the responsibility fundamentally rests with the State or corporation in whose service he is. Retrospective action against the official is reserved. The ordinary course of justice may not be excluded. The appropriate statutes shall make any more detailed regulation.' This unassuming Article is so constructed by the Reichsgericht that it may be called the *ultima ratio* of the *Rechtsstaat*.

This Article is taken as directly operative law, that is, it requires no special statute to found its valid application, and extends everywhere, permitting only small exceptions such as the exclusion of liability for notaries. The Court holds the Article to be the *only* foundation of official liability; and, further, the interpretation of who is an official is decided by the Reichsgericht, and not by State law.[1]

Thus according to the present situation, the State takes all liability for its officials (the immediately employing body, Reich, State, or local authority is liable). The person who has committed the error is no longer of concern,[2] and when an official is jointly provided for by a number of authorities, one or the other is judged liable. The decisions of the Reichsgericht and the State Courts make the distinction, with which we are already familiar, between faults which are clearly of the Service and those which are personal faults of the official. Here, as in France, the line is not easy to draw in marginal cases, and there are occasional anomalies. The law uses the phrase 'in the exercise of the public power entrusted to him'. Hence, any action and damage which is not within this field has nothing to do with the Service or the liability of the State. Further, the wrong must have occurred in a *duty* towards a third person, not simply in a voluntary service which the law does not enjoin. Finally, the

[1] Thus R.G., III, 3, 22 Nov., R.G.Z., 105, 334 ff. [2] R.G., III, 5 Oct., 20.

wrong must have occurred by intention or negligence; cases may occur where the law upon which the official acts is of some dubiety, or where lunacy extinguishes the notion of culpable faults. The official is here personally liable.

Criminal Liability. The official is personally liable for criminal actions, as included in the Criminal Code, in the course of official duties, e.g. corporal injuries, violation of freedom, constraint, and torture. The jurisprudence of the Reichsgericht maintains that the 'previous question' (*Vorfrage*, or *Vorentscheidung*), whether there is at all violation of official duty, must come before the ordinary Courts.[1] That is, there are practically no relics of administrative prejudice in Tribunals of Conflict or their like.[2] Such defences of the official used to exist, especially before 1879,[3] when the departments or administrative Courts had the right of preventing appeal to the ordinary Courts until (but only until) they had decided the question whether the official was guilty of the offence of going beyond or neglecting his official duties.[4] The intention was to protect the official from capricious complaints.

There is a class of case in which a wrong has been done, but where the fault cannot be called *culpable*. This is similar to the French differentiation between an average or normal fault, which lies in the normal nature of men and the Service, and a *grave* fault. It is for the *grave* fault that the servant or the State is liable in France; it is for the *grave* fault only that the servant or the State is liable in Germany: when the fault is normal, unavoidable in the normal state of human nature, no one is responsible (so according to the terms of the Civil Code 839). But sundry statutes make exception from this state of affairs and positively assert State liability in specific matters. So in various statutes regarding damage caused by riots when the public authorities are impotent to intervene effectively, e.g. Reichsgesetz, 12 May 1920. Yet where such laws are not existent, the immunity of official and State ceases where the illegal action redounds to the advantage of the State. This is similar to the French tendency to compensate *for risk*, that is, where public works or activities cause special injury to a citizen.

The State or Reich can demand satisfaction from the official for the damages it has had to pay, but his liability ceases to exist after three years.[5] The officials of local authorities are in the same position.[6] Officials may claim that they are not responsible.[7]

[1] This is on the basis of Article 131 and 11, Introductory Law to the Judicature Act (*Einführungsgesetz Gerichtsverfassungsgesetz*). But the Courts are permitted to exclude the procedure up to the decision of the question whether the challenged behaviour of the official was legal.

[2] Jellinek, *Verwaltungsrecht*, pp. 316–17; Fleiner, p. 284 ff.

[3] The date of the passage of the Reichsjustizgesetz.

[4] Cf. Mayer, I, 192, and especially 199. [5] Art. 2; Prussia, Art. 3.

[6] Prussia, Art. 4. [7] Cf. Schelhorn, *Die Amtshaftung*, pp. 40 ff., 96 ff.

All this so far is concerned only with the amenability of the official and the official institution to the ordinary Courts, though in the background there is the disciplinary relationship between official and State, a subject we have already analysed in a previous chapter.

Administrative Courts. The main purpose of the Administrative Courts is to give judgement on the legality of administrative actions, and disciplinary aspects of official activity.

(*a*) Administrative jurisdiction (*Verwaltungsgerichtbarheit*) of a simple and non-judicial kind begins with the free power of the citizen to challenge directly official action or decision, and the improper use of governmental discretion when exercised by an institution, by means of a complaint (*Beschwerde*) or claim (*Einspruch*) made before the superior institution in the hierarchy;[1] and this may be ultimately settled by the higher administrative authority or administrative Court.

(*b*) The intention of administrative jurisdiction is to secure that the orders of public authorities shall be legal both by regard to written law and to natural justice respecting life, liberty and property.[2] It is their duty to state the law when that has been challenged, as it was the business of the English Local Government Board to state what was right in the dispute between Arlidge and the Hampstead District Council. Their work is recognized as of a contentious-judicial nature and therefore they are established with the conditions of independence of mind; but since the subject which they have to judge is one –government—of a complicated technique they are given the conditions, too, which will make this possible.[3] So far has opinion changed since 1849 that whereas then the administrative Courts were constitutionally forbidden, the Constitution of 1919 expressly enjoins their creation[4]: 'In the Reich and the States, administrative Courts shall be created, according to statute, for the protection of the individual against orders and rules of the administrative departments.'

Each State has its own system of Courts, and although there is a movement for a Reich Appeal Court, such does not yet exist. The States have a varying number of instances (some only one) and as a rule the lower instances coincide with the local government divisions of the State. These instances are committees of the local authority and include one member who is expert in the law and administration (since he is the chief executive officer of the authority), and the rest are ordinary lay-members of the council. In the higher instances of the local authorities (in Prussia) one member with qualifications for judicial office and another with those for the higher administrative service are appointed *for life* by the Prussian Cabinet. There are

[1] Prussian O.V.G., 17 December 1900.
[2] Cf. Fleiner, p. 247.
[3] Anschutz, *Handbuch der Politik*, p. 458.
[4] Art. 107.

criticisms of this mixture of administrative and jurisdictional institutions and suggestions that there should be separation.[1]

The *Superior Administrative Courts* in Prussia and the larger States are judicial authorities independent of the administrative apparatus, but in other States there are various kinds of connexions with the administrative departments, or the ordinary Courts. In Prussia the Court is composed of a president, several senate presidents, and councillors, all of whom have life-tenure, and are removable from office only by a decision of the full Court. One-half the members have qualifications for judicial office, the rest for the higher administrative service.[2]

What is the field of jurisdiction possessed by these Courts? It may be granted in one or two ways: by general grant (*Generalklausel*), or Enumeration (*Enumerationsmethode*)[3]; in the former the citizen is given a general right to invoke the power of the Courts against any act of an administrative authority, in the latter there are enumerations from time to time of which subjects falling within certain laws are actionable before the Courts: almost all the German laws on the subject follow the enumerative method, and even those with a general clause exclude certain matters.[4] The Courts are concerned with the respective competence of municipal authorities and the various institutions and officers thereof, or between individuals and the authorities regarding claims and obligations arising out of public law; the conflicts over powers between the higher local authorities and the central authority, rates, orders under the police power, subjects which in English law are dealt with either by the Departments of State or the ordinary Courts of Law.

In Prussia in the lower instances the jurisdictions are conterminous with the scope of their administrative powers, and they settle questions of law and questions of the proper use of discretion. In the matter of discretion their decision is final, and their jurisdiction is only challengeable in the higher instance regarding law and fact. Yet these two taken together do involve the superior instance in questions of discretion, for it asks whether the Order made was reasonable or necessary.[5]

States vary regarding the permissibility of actions on the objective

[1] *Vereinigung der deutschen Staatsrechtslehrer* (1929): *Wesen und Entwickelung der Staatsgerichtsbarkeit*: *Überprüfung von Verwaltungsakten*; also ibid. (1925), *Der Schutz des öffentlichen Rechts.*

[2] Dieckmann, *Die Verwaltungsgerichtbarkeit in Preuszen* (1926), p. 41 ff., for the composition of the various courts.

[3] Cf. Fleiner, 241 ff.

[4] The method of Enumeration has, according to Fleiner, these demerits: it requires continual attention from the legislator and permits the administration to withdraw from challenge. He says that the service of the true purpose of administrative justice requires the General Clause, i.e. challenge without exception.

[5] Fleiner, p. 73.

rights of citizens to good law—in Prussia such actions are permitted, in other States, for example, Hamburg, only a direct, individual injury may be alleged.[1] The actions on the objective rights give State and local authorities, and the executive and the councillors in local government, the opportunity to raise issues against each other's actions and interpretations of powers and obligations. The other subjects of jurisdiction are extremely numerous and cover many aspects of government.[2]

Procedure before the Courts is in the form of a *lis inter partes*, i.e. a contest between parties, these being either individuals who oppose each other, or public authorities against each other, or the public authority against individuals,[3] and they are to each other as complainant and defendant in civil actions

However, the civil procedure, which is followed, is departed from in this respect, that representatives of the public interest may be heard,[4] and this is secured by a representative acting as chief party, or co-party, or through a commissioner, or through the president of the Court.[5] Procedure is public and oral.[6] Not only may the parties demand a review before the highest Court, but other persons may require review on the grounds that the public interest is involved in the magnitude of the issue.[7]

The Courts, their procedure, appeal, execution of judgement, and the discipline of the members of the Courts are regulated with minute exactness, but these details, though they are of the highest importance, cannot be reviewed here.

The main lines of the German system are clear. The citizen has good guarantees that the administration shall not act outside the law, and damages are available from the public treasuries, while officials are well protected in their professional rights. Except in the lower instances there is no suspicion of *raison d'État*, since the Courts are independent and properly trained, but some, though not serious, criticism is levelled against the admixture of administration and jurisdiction in the lower instances,[8] and the danger of political bias in the selection of the lay element, yet even there the lay element is recognized as a protection against bureaucratic perversion of power, and as a contributor of a special expertness, viz. that of the knowledgeable man in general social life.

No System. It must not be thought that the German system is a complete rationalized apparatus having its final, uniform and commanding summit in the Reich Administrative Court. The States, as we have indicated, vary in regard to the General Clause and Enumer-

[1] Fleiner, pp. 73 and 77.
[2] E.g. Gesetz uber die Zuständigkeit der Verw., etc , 1 August 1883.
[3] Cf. Dieckmann, p. 52.
[4] Prussian O.V.G., Sects. 71, 74, 80.
[5] Dieckmann, 63 ff.
[6] Ibid. 31.
[7] O.V.G., Sect. 93 and Dieckmann, 99 ff.
[8] Cf. *Vereinigung*, op. cit.

ative Method, the constitution of their Courts is very varied, and at the summit (and then only in some matters) there is not a single Court, but a number of unrelated tribunals. They are the Reich Economic Court, the Insurance Court, Private Insurance Court, the Finance Court, the Settlement Court, the Patent Office, the Public Assistance Courts.

Survey. On the whole German thinkers are well satisfied with the system, but look to the establishment of a Reich Court, with more uniformity and systemization in the States and the introduction of the General Clause, since the practice of enumeration has left gaps for which there are no redress.[1]

Doubts have been expressed regarding the merits of administrative justice compared with the capable and impartial judgement in the ordinary Courts; but on the whole they have succumbed to the consideration that the administrative Courts are both independent and yet capable of judging propriety, legal and circumstantial, in government, a matter not so much within the capacity of the Civil Courts.

If we add to all this that general orders are challengeable before the ordinary Courts for their validity under enabling statutes,[2] that the administrative Courts can be invoked to decide whether the proper procedure has been followed in administrative activities, judgements and commands, and that there are developments of judicial review of the constitutionality of laws and orders, it is clear that the Reich, Prussia and some of the other States, though by no means without imperfections, give the citizen ampler guarantees against arbitrary and incompetent public administration than exist in England.

Limits to Remedy. One final point is worth mention. Everywhere there is a point which the Courts and the law holds to be unreviewable and unchallengeable: this is what is called variously 'discretion', *freies Ermessen*. What does that mean?

The Courts act with an eye to the reasonable action of reasonable men. Not to do this would be in every case to attempt to substitute their judgement of persons, facts, and expediency for that of the officials who are actually immersed in the thousand details and their conjuncture which call for his action or forbearance. Hence the courts make allowances for circumstances of time and place, especially situations of emergency, sanitary, civil disturbance, and military aggression. They refuse to follow the official's decision and effect beyond a certain point. If, in fact, they did not practise this forbearance, all administration would be paralysed by fear of error.

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The American Federal authority has enjoyed an advantage over England, and suffered a great disadvantage: there has been no fiction of the infallibility of the Crown, but there has been the obstacle of the

[1] Cf. Lassar, *Das Reichsverwaltungsgerecht* (1930). [2] Fleiner, 72.

separation of powers. Yet while the latter has been steadily overcome by the practical vesting of judicial functions in administrative bodies, and the assumption of administrative powers by the judiciary, the former has not given the opportunity to make the State liable for the torts of Federal officials, and the doctrine of non-suability of the State is well established.[1] Further, the subordinate legislative powers of the Executive Departments are enormous, though the pretence is maintained that these are not real legislative powers. The State is not liable for torts committed in its service; executive officers are themselves civilly liable for illegal and unconstitutional acts done in their official capacity,[2] and cannot plead the orders of a superior officer. Where the officer has acted legally, but with *unwise* use of discretion, there is no liability.[3] There are the rights to obtain injunctions against illegal and unconstitutional activities, mandamus to compel the performance of non-discretionary (ministerial) acts, and to compel the exercise of discretion, but this does not extend to direction of the exercise of discretion.

As regards contracts, the régime of petitions to Congress gave way in 1835 to the Court of Claims 'to hear and determine all claims founded upon any law of Congress or upon any regulation of our executive department, or upon any contract, express or implied, with the Government of the United States.' . . . This and subsequent amplifying legislation and the judgements of the Supreme Court have carefully excluded the consideration of cases which 'under the assumption of an implied contract, make the Government responsible for the unauthorized acts of its officials, those acts being in themselves torts'.[1] The Court of Claims is composed of judges holding the tenure *quam diu se bene gesserint*, and are appointed by the President, by and with the *consent* of the Senate. In evidence and procedure it is analogous to other Courts. The most interesting and instructive developments in the sphere of administrative jurisdiction are those in the various great Commissions like the Intestate Commerce

[1] Cf. Singewald, *The Non-Suability of the State in the United States*, Johns Hopkins University Studies, and Watkins, *The State as a Party Litigant*, Johns Hopkins University Studies, 1927. Watkins (p. 55) says: 'We adopted it (the doctrine) without considering whether it was valid, essential or desirable . . . Historically there seems no other explanation than simply it was accepted by us as something belonging to the normal course of things.' So until 1868 when a doctrine of utility was invented: *Tucker v. U.S.* (1868).

[2] Cf Story Commentaries, Sect. 1671. *U.S.A. v. Lee* (1882), 106 U.S., 196; *Mac and B.R.R. Co.* (1883), 109 U.S., 446, 452; *Poindexter v. Greenhow* (1884), 114 U.S., 270.

[3] 'Whenever from the necessity of the case, the law is obliged to trust to the sound judgement and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgement' (*Downer v. Lent* (1856)), Cal. 94.

Yet malice, and bad faith, corruption, seems to leave an opening for recovery.

[4] *Gibbons v. U.S.A.*, 8 Wall, 269.

Commission, the Commissioners of Patents, the Federal Trade Commission, and others, whose functions, the continuous and regular application of the law to very complex economic and technical phenomena, have been recognized by the Supreme Court of the U.S.A. to be judicial.[1] From these, however, after the advantages of administrative jurisdiction have been exploited, appeals are properly permitted.[2] We must leave the study of their technique, their safeguards for social as well as individual justice, and their relationships with the ordinary Courts, and the institution of 'due process' which we have previously described to the reader.[3] It is enough if we have indicated the problems.

* * * * * * *

We have now surveyed the problems raised by the administrative features of the modern State in their evolution and contemporary form. We have seen the rise of the Civil Service, the forces which governed the formation of its character in different countries, and the influence of social forces, and democratic institutions upon its present qualities. Three features emerge, pronounced and striking: the search for impartial expertness, the attempt to control, parliamentarily or through the Courts, its potentially aberrant actions, and the attempt to reconcile police and minstrant functions with the freedom and security of the Civil Servant. These are still problems: they are unsettled; they are lashed by the flux of social forces. Yet what is the attitude of the Public—the sovereign Public—to these mighty machines of government and the conditions of their operation?

[1] Port, 276; see Smellie, 'Some Aspects of English Administrative Law,' in *Public Administration*, July, 1927.

[2] This review is 'limited substantially to two questions, first, whether there was evidence before the administrative body upon which reasonable men might fairly have arrived at the conclusions reached; and second, whether any rule or principle of law was disregarded in reading them'. Dickinson, op. cit., p. 190.

[3] Pound, *Administrative Law in America*.

CHAPTER XXXVII

THE PUBLIC AND THE SERVICES

THUS a multitude of laws and practices establish, direct and control the public administrative services. What is the result? What do they produce? What does the public think of the product, and what ought they to think?

In every country there is a vast body of men and women drawn to the professional service of the State. Everywhere, and with few exceptions, they are highly educated, formally, in relation to their duties and their counterparts in non-public industry, and this in spite of the 'crammers' who live upon examinations. Yet this education and the related formal tests are nowhere entirely appropriate to the specific tasks to be performed, and the world is as yet merely stumbling towards a proper method of preparation and selection for the public service. For the truth is that under the common rubric of the 'public service', and even within its broad general classes, the tasks are multifarious, each calling for a special aptitude, a different combination of 'service elements' as the American administrative scientist would say.

In private industry there is supposed to occur a continuous process of selection by competition, and a minute adaptation to the local and personal diversities of the consumer. The profit incentive, the danger of bankruptcy, and the singleness (if narrowness) of mind of the business-man often produce this result. Hitherto, however, the public services, local as well as central, have concerned themselves rather with the production of wholesale quantities of uniform products at the margin of urgency, than with the creation of individual satisfactions in the vast field of individual desires. The developments of the last quarter of a century, however, in State and municipal ownership and management, leave no doubt that the field of their legitimate and useful operations is very large, and quite as large is the variety of forms in which they can become effective: there is a judicial control, judicial-cum-administrative control, administrative control, and complete State ownership and operation, and of these there are many subtly different varieties. The tests of capacity must be correspondingly diverse.

The clerk in the colonial office, the inspector of education, the

director of the electricity department, the chief of a savings-bank division, the diplomatic service, the Treasury examiners of estimates —for each of these there is the optimum training. So far capacity to learn, tested generally, and such attributes of character as honesty, vital to the public services, have been sought. It is not enough. The simple motives of security, respectability and social prestige, especially of the great classes of the disinherited in a modern society, may be enough in a world where only one-sixteenth or thereabouts of the productive population are Civil Servants, and where initiative has not hitherto been of first importance; but they are insufficient in a dynamic State.

All the Civil Services show remarkable zeal, but the law and the nature of the service tend to confine this zeal to rigid and narrow channels. The exhilaration of adventure and conquest do not exist, while legal permissions and prohibitions which surround the task and the office produce a cautiousness, sometimes a veritable misanthropy. *Le règlement* is not only the excuse for sloth, but sometimes really causes it.

Moreover, the slowness of personal transfer and circulation, and the sense that there is an 'establishment' which nothing can alter, engenders and nourishes the feeling that one is in a rut from which it is not worth while to attempt to emerge. Incentive is blunted, and discouragement sets in, and leisure comes to be enjoyed rather than applied. Yet there are conspicuous examples of men who have found themselves in the service of the State, and whose impersonal passion for their work survives the temptations of an acquisitive society and the comparative smallness of their salary, so that the State is often served at one-half or one-quarter or even less the rate of pay obtainable outside its ranks. Such men and women, put into key positions, are of inestimable value as the leaders of their staff, especially the younger generation.

Public responsibility produces a tendency difficult to resist. It is over-routinization and over-conscientiousness. In the end, whatever the technical answers to technical complaints, the State services have to reply to the public in or out of Parliament, in terms of the cultural or civilization value of their actions. Too often the quantitative answer which settles, if it does not convince, the complainant or opponent is, by nature, not available. A linguistic answer must be given. That is, it must be persuasive, and as the office must answer for it, two things occur: the reports go from official to official up the hierarchy to the chief, and, when in doubt, risk is not taken so much as passed on, and records must be made, kept and consulted as the warrant of justification. Time and audacity, the mother of invention, are apt to be lost, all round.

The power of the State is immense, and whether as policeman or tax-collector, or licenser of automobiles, or gas works, or a passport

office, or controller of agricultural research, it confronts the citizen with the aspect of inescapable doom. The Civil Servant is part of a machine of domination, and accession to office, according to reports from all countries, tends to produce in him an overbearing attitude, which sometimes merges into tyranny. This, even when it falls short of legally challengeable misfeasance, can be extremely painful. Roughness and authoritarianism is infrequent in England, as the Service has always been confronted by a strong Parliament and sense of self-government, but there is a growing dislike of the expert, founded partly upon his prevalence, and partly upon public ignorance. France has more of it, partly owing to the tradition of *la puissance publique*, and partly to the French petty bourgeois veneration of officialdom (when they or their relatives are, or are likely to become, officials), partly to the official's defensiveness against a critical and sarcastic public, out of self-compensation for the insults and reprimands showered downwards in a strongly hierarchical system, and out of the spontaneous sullen malice of the miserably underpaid.

In Germany the Services have still the authoritarian tradition, an intentional sternness. But all that a nation can do is being done to smooth the rough edges and convert officiousness into good offices. The Civil Service schools and associations work for this end. The Constitution declares the rights of the public very clearly: 'Every German has the right to make requests or complaints to the competent department or representative body in writing.' In fact, even before this declaration of rights was made, the public was very ready to approach officials, especially the local bürgermeister, who in some cases is looked upon as a veritable Providence. Why not? It is part of the general code of duties of German officials that

'in their intercourse with the public officials must always be courteous. They must avoid roughness and apathy; they must be friendly and obliging; must try to further the affairs of all who appeal to them, and readily give advice and information to persons who are ignorant of the law and official routine, providing that official duties or the legitimate interests of others are not opposed thereto. Quiet and circumspection must be observed, since procedure may easily awaken an impression of violence and prejudice and make difficult the execution of business. The mode of dealing with the public also depends in a certain measure upon the educational level and the breeding of the individual, and the right way here will be indicated by the natural tact of the official.'

It would be possible to extract from the decisions of the *Conseil d'Etat* a similar set of injunctions for France. Such injunctions are very urgent, since an aggrieved citizen is faced with a dilemma: either to suffer rough treatment without the possibility of turning to an alternative source of supply of the Service, or to make a formal complaint and be obliged to go through a wearisome course of correspondence long after the first smart has passed away.

What of the public's attitude to the Civil Service? This is compounded of some curiously mixed ingredients. The public is hostile to the official, it is afraid of him, misunderstands him, occasionally admires him.

In England, the general public is on the whole mildly indifferent to the existence and work of the Civil Service. There is, however, a general impression among moderately intelligent newspaper readers, that 'red tape', or unnecessary slowness and formality in the dispatch of business, prevails, that Civil Servants without deserving it lead an enviably secure life, permanently assured of short hours, good pay, long holidays, pension rights, and not much work; that incompetence goes unpunished. The vulgar newspapers and occasionally those of higher reputation, exaggerate this view, and spread this prejudiced ignorance among people who cannot possibly have an independently-formed opinion upon such matters. The vaguely remembered descriptions of Dickens's Sir Tite Barnacle and the Circumlocution Office and the daily round of Anthony Trollope's 'Three Clerks' lend a background of colour to more modern instances of inefficiency. Every Englishman firmly believes he is a 'sound' economist and the stern guardian of civic liberties. He is therefore easily alarmed when he is told that expenditure on the Departments is mounting up. One or two digits and several noughts suitably arranged play havoc with his imagination. He speaks his mind, nay, he thunders, about the Civil Service and officialism, in the blunt way which is an Englishman's heritage, though he does not know what the money is spent on.

Civilization is precarious in proportion as we forget the struggles that went to win it, and these are forgotten in proportion as the victory seems secure. The fruits of material civilization, the health, security, peacefulness, the relief of the poor, the education, and the many other things administered and administrable only by the State, seem to him to have come with the soil and the trees, the mountains, the rivers, and the fogs, from nowhere in particular, and seem not to be dependent, as they are, for their continued existence, upon the toil of men and women who must be paid. With some newspapers this attitude is made more irrational and uncompromising by their ferocious antagonism to State interference with industry. Among the general population it was spread by the feeling against war-time administration. This feeling was, in part, carefully organized by interested opponents of State interference. For the rest it was a spontaneous protest against the galling restrictions of war-time, and some of these were, in truth, the product of nothing more than irrational fears. The discipline and the sacrifices of a modern nation under arms are necessarily bitter, in spite of the consolations of patriotism, and the Departments were the natural executives of war economy. What

more natural then, than to grumble, and attribute the *malaise* of war not to its real causes, but to the Departments? Nor did administration always achieve its objects, even though much friction was caused and the exchequer ceased to keep count. The effect of the War in these, as in other, respects has not yet been dissipated.

The occasional revelations of administrative pathology are, in the formation of opinion, more powerfully efficient than the steady meritorious work accomplished day by day, which, after all, is the foundation of English government. The public service suffers because it is the only business concern which does not advertise: it is the only one which constitutionally invites all and sundry to slap its face. Civil Servants know this only too well, and at their professional meetings discussion often revolves about the methods of spreading real knowledge of the part actually played by the Civil Service in the modern State. The principle of ministerial responsibility, the balance wheel of the English political system, consigns the Civil Servant to anonymity when he is right, and not seldom exposes him to mordant attacks when he is wrong.

In France, the *fonctionnaire* looms larger in the public mind than in England; for despite many revolutions, the principle of individual liberty has not been very usefully embodied in institutions, and age-long tradition of *étatisme* and centralization remains unshaken, and, indeed, in the last three decades, it has been notably reinforced. The administrative spirit of Louis XIV and Napoleon I still finds a congenial home in Paris and the capital towns of the *départements*; and the one million officials and employees amount to one in fifteen of the entire electorate. By the public, then, the Service is disliked and suspected; it is often arbitrary and unjust in its decisions, and, by retarding its judgements, often for years, it abolishes for the citizen the only tool which might give substance to his rights. Perhaps derision has more play than solemn dislike. Invective, frequently scabrous, and always pungent, is poured upon the incumbents of the *bureaux* with a Rabelaisian zest.

Monsieur Lebureau, if I may be permitted to change his sex for a moment, is a national Aunt Sally, at whose figure it costs nothing, while it brings gay applause, to fling barbed epigrams. Here, as in other walks of life, it is possible to enjoy a grumble, because no one expects to be called upon to amend the thing at which he grumbles, the politicians least of all. Balzac, De Maupassant, Georges Courteline, and Anatole France have limned immortal pictures of the *fonctionnaire*: a rather somnolent person with occasional love-affairs and domestic worries, anxious to propitiate his superiors and to kick the behinds of subordinates, zealous to earn his living and decorations with the minimum of work and the maximum of thought-saving habits, and mildly yet invincibly certain of his social dignity. It might be a

description of anybody: we are all akin; and that is what the political scientist is obliged to remember.

The sharpest thorn in the side of the French Civil Servant is, of course, the Chamber of Deputies. That impetuous body makes mighty prods at the Service, and, in the name of democracy, even attempts to control the everyday work of the Service. It succeeds in getting much enjoyment out of the former; but never has, with anything like the excellence of England, effected the latter. The Service, then, goes its way, hide-bound by traditions, some of them good, by solidarity of interest in its own defence against the aggression and contempt of Monsieur Le Parlement. Public dislike and derision, which are in one way tributes to power, have as their counterpart a widespread desire for employment in the Service, but in recent years less in the upper branches than in the minor clerical and industrial grades. The pay is low, but the *fonction* is a safe refuge and relatives and friends are respectful toward some one 'in the Government'.

In Germany, until the Revolution, the Civil Service was a highly honoured aristocracy. It was an estate of the realm, and a great profession; and its highest grades were easily on a par, in influence and public esteem, with the *Offizierkorps*. You could no more insult them than you could insult the Emperor. Its efficiency was real and of a high quality, and did not fail to obtain public recognition. The Reichstag, as Bismarck was supremely fond of saying, was a *Redeparlament*: it deliberated at great length. But the bureaucracy did valiant service and was uncorrupt. It was the real governor of Germany, splendidly trained, clever, forceful, industrious, far-sighted, public-spirited; and the nation had never known any other. The citizens were not unhappy with this government in steering the course of which they had no part; and the relationship between their contentment and the bureaucracy was not difficult to trace.

The advent of the Republic shook the authority of the Civil Service, though it did not impair its essential power, and it will be decades before the spirit of a free electorate permeates this more ancient institution. The period of inflation adversely affected its corruptibility, but when the whole world was gambling to live, the Civil Servant could not be expected to starve; the misdemeanour was fugitive. The main lines are still unshaken: a Civil Service great and growing in size, efficient in the highest degree, respected and uncorrupt, somewhat autocratic in its action, but with the promise of liberalization through republican institutions.

The United States of America was born in detestation of the executive power, and it may one day die from subjection to the expert. At this moment there is, all in all, only the makings of respect for the public services and a faint prescience of the good they may do. The grafter has demoralized the Services, and, worse still, degraded the

notion of public service. Side by side with the existence of a vast number of officials in Federation, State and City, there is contempt for those who will not chase the dollar outside the public service and who are partially dependent upon politicians for their prospects. And the politicians are ever vigilant for 'usurpation'. But a complete generation of reformers has awakened interest and hope in Science and Service: the danger is that they may go so far in their enthusiasm as to give pseudo-science and pseudo-service an undue grip over the amateur and the citizen.

In every country the public is hostile to the official because at some time or other, as an inspector or a tax collector or a medical officer, or what not, he comes to take away, not to give—it is in the nature of his task to limit one's freedom and property. This is not done for himself, though he may feel some satisfaction in doing it—he may feel powerful, stern, a *deus ex machina*, yet in the end the deed redounds to the benefit of certain individuals and groups in the background. One experiences the deprivation, but the social benefit is not so easily discernible, just because it is social and diffused rather than immediately personified. The public fears the official and the extension of official activities, because it feels there is no chance of appeal, no alternative to official judgement. It cannot understand, without careful tuition, why officials receive pay and pensions, why, indeed, they are needed at all. All other businesses explain themselves. In Germany advertisement is less necessary than in England, because the activity of officials has for over a century been an honoured part of the general civilization to which all are accustomed. Even so, the German Civil Service associations do not maintain a sulky silence, but keep themselves well in the public eye, both inside and outside Parliament. A few among the public everywhere recognize the significance and difficulties of the official's function; ought not steps to be taken through every medium of publicity to overcome the hostility and distrust?

Supposing one were asked for a Civil Servant's vindication in regard to the Public, what would it be? This, I think:

'I possess great power, and I may do you harm. I do not, however, act for myself, but for the public good as determined by Parliament or the local authorities and often by direct representations from the public. Nor do I act arbitrarily, but according to rules which are equally valid for everybody. Not my will prevails, but the will of other members of the public. If, therefore, you quarrel with my powers, you should not blame their immediate executor but their ultimate creator. Yet, of course, some discretion is necessarily left to me, and I know that I ought to exercise this with all politeness, understanding and the infliction of the least amount of necessary pain. Like all men—like you, for example,—I am sustained in my work by my pay and other rights, my zeal is not consistently at its highest level, and I have alternations of mood, sometimes I am alert, sometimes slack, yet I will not deny my services because

they are troublesome to me and because they are just a little beyond the minimum which will forestall and avoid complaint, but positively seize opportunities to be helpful, fitting the remedy carefully to the case. Your own roughness, accent and social standing may affect me, but I will try to avoid letting them improperly bias my reasoned judgement. Business would proceed more speedily and appropriately if you would co-operate with me by recognizing my difficult position and treating me with sympathy rather than hostility, if you read all the rules which you are supposed to read and keep before you fly into a temper because mistakes have occurred, if you willingly co-operated on the various committees which are and should be established for collaboration.

'Even with all the arrangements and personal control which conduce to smooth working of the Service and satisfaction of the public, I may still suffer from unsympathetic treatment because ultimately I am the representative of the State—that is, the *whole of the public*! You will of course enjoy my power and applaud it when it does you some immediate good: I must beg you to recall the significance of my work when I have to weigh the rest of the public good against you. I at least am a member of a body which is neutral in the State, or rather helpful to all. You cannot buy more of my services if you happen to be well off, you will not get less if you happen to be badly off; you will not be passed over if you belong to one particular party or given special privileges if you belong to another. We represent the unity and collective control of the State. I give the whole of my time to the work, and am as entitled to my pay and pension and other rights as any other worker. If my services are intangible or misunderstood they are nevertheless productive and important. Without them, your State will be nothing but a desert full of the discordant noises of people giving contradictory orders: it will crumble and cease to be a State—for a State is co-ordinated action.'

CONCLUDING OBSERVATIONS

NOW that the arduous task of impartially examining a vast and complicated system is concluded, what if we began to broach questions about the worth of its principles and the survival of its machinery? The answer, I am afraid, is a deep misgiving, and the feeling that only by singular good fortune will modern government prevent social catastrophe and avert its own destruction.

Is 'good fortune', then, the last word of so much science? Is disaster seriously expected? We appeal to good fortune, however unwillingly, because close investigation of the foundations of government increases the sensitiveness to the possibility of their failure. How delicate and fragile are the organs of the functioning arrangement! The saving filaments of co-operation and the discipline appropriate to their efficiency, have been created only with enormous difficulty, and at the cost of centuries of painful striving and sacrifice. Generations and generations of civilizing effort, of mental and material struggle, of scraping and saving, violent death and self-denial, of bitter lessons, and failures, and groping search, have barely sufficed to their achievement, such as it is to-day. Yet a single new force, one louder voice, a question, stupid no less than clever, a trifling discovery in technique, may be uncontrollably disturbing. For all depends upon millions and millions of contacts, adjustments and tenuous accommodations, which may easily be thrown out of equilibrium and regular operation. Consider the delicate adjustments of the Cabinet System; consider the tact and equipoise of majority and minority secreted in parliamentary procedure; consider the problem of maintaining both ability and neutrality in the Civil Service; consider the temptations to pervert the electoral process, and consider the burdens of taxpayers; consider, again, the propensity of human nature to quarrel and fight, which, though it is occasional, may, if it seethes up for only a few red moments, destroy the peace and possessions and habits which have taken generations to create. . . .

Government revolves around the complicated and delicate adjustment and interaction of millions of independent volitions which seek both development and order, so liable to be incompatible the one with the other. An unwonted degree of intensity in the impulsion of any one of them, produces repercussions in all the connected and

connecting threads. As Swift said of Europe, such a balance of power may be attained, that a single sparrow, lighting on one side, may upset everything. In the long run there is a balance in Government analogous to the 'balance of Nature': touch one element and all the others are affected, whether it was intended or not. Because of their myriad number, because the force of each is not quantitatively measurable, the reactions are incalculable, and one cannot but be apprehensive of the possibility of collision, destruction and terror. If we knew for certain that, in proportion as dangers arose, counteracting and proportionate scruples would also arise, with reciprocal effect, all would at least be as expected. Otherwise, and things are otherwise, one appeals to fortune: the attainment of a pleasure-giving conjuncture of events when we know matters to be beyond the range of our exact prediction and complete control.

Yet this is not all. One is uneasy because some factors in the situation seem inevitably to lead to disruption.

The very essence of the modern State is distribution of supreme governmental authority among all its citizens. Supreme authority is 'atomized'. Sovereignty resides in all adult individuals, and, therefore, government issues from their volitions. There is no original presumption of a unity transcending that which individuals and groups *may* arrive at by a process of bargaining and electioneering. Those who want a planned and co-ordinated social existence must permanently prove its value to the satisfaction of a majority of the nation. The possibility of dissent is unhindered. So for political authority; so, also, for economic enterprise. Such doctrines encouraged, and were intended to encourage, revolt; and they still make a regular system of contingent dissent and disobedience. Now, everybody still recognizes the necessity of some control, and in most cases, a great deal of control, over the behaviour of children, to prevent wrong decisions, and the manifest results of selfishness and malice. But when is an adult not a child? How many ever cease to be children, and become capable of self-control by regard to wide and rational consideration of relevant but distant social facts and consequences? Modern psychology and biological experiments have done to death the old-fashioned belief in the control of instinctive nature by reason. Reason still exists, but to make it effective requires deliberate efforts of immense difficulty and complexity.

All the great teachers of freedom in politics and economics, men like Harrington, Montesquieu, the Physiocrats, Rousseau, the Mills, long before the vital but disturbing days of psychological discovery regarding the Almighty Unconscious, either postulated that citizens would be capable of self-control and a 'national' criterion of social decisions, or they prescribed a set of doctrines—a sort of civil religion—which people must accept, even at the point of the sword (thus

Rousseau), or be taught. At its most dangerous margin, and it was then by no means so dangerous as modern science teaches it is now, their optimism was tempered by resort to deliberate control and formation of the mind. Nevertheless, all men and women, whatever their capacity, were made the ultimate statesmen of the modern world. Even as Luther's doctrines made every person his own priest, and, as the *laissez-faire* economists converted every person into an independent economic adventurer, so the democratic theorists appointed every man a statesman. But it was understood, even when government was relatively simple, that capacity was not innate but required deliberate provision and attainment. And even since John Stuart Mill's time, government has become an immensely more difficult task, because it comprehends many more groupings, activities, forces and relationships. Within a much larger organization there are many more joints and weldings, and, concurrently, the need for understanding how to avoid overstraining them has become critically urgent. It became steadily apparent that where ignorance was electoral bliss it was noble folly for a government to be wise.

'We have stupidly and complacently parroted the cry: 'We must educate our masters!' What, however, have we done? With a collapse sooner or later easily predictable, and with the knowledge that even the maximum of education would, perhaps, not help very much, the ruling classes preferred to surrender only the barest minimum consistent with industrial efficiency and the avoidance of violent revolution. And this, in spite of our growing knowledge of the immense force of man's uncontrolled instinctive nature. That was a fault of the first magnitude; but it was not their worst fault. For social life itself, which teaches so vividly, aggravated an already parlous situation: the very classes who went through (we cannot say benefited from) the most expensive, and, in many cases, the best available education in our time, provided by their pleasures and their exploits, recorded in the Press, the Drama, Literature, and the Cinema, an example which was the contrary of all that it should have been. They inspired nothing but a base envy, for they consumed extravagantly yet failed to create and diffuse civilized felicities worthy of preservation. Unfortunately, and again unfortunately, for the peaceful and generous flowering of human society, the vulgarity of their achievement and the magnitude of their wanton and unlovely waste are destined to have consequences not merely painful to themselves, but disturbing and expensive to those who provide the conditions of civilization by creative services and patient discipline.

So far, then, from an appropriate organization and doctrine assisting to overcome the insurgent brutalities of human kind, the actual organization of the world has rendered a definite disservice. It has

not sought, and it certainly has not found, a way leading to a common and dynamic morality, it has but tardily and meagrely supplied a thousandth of an insufficient grain of intellectual improvement.

There is inherent, however, in the modern State, an element which has aggravated this situation, has already powerfully contributed to one great catastrophe, the War, and brings us every day nearer to another. (By catastrophe I mean a process of change which escapes human control, and produces unintended and unwanted happenings.) I refer to the fact that the modern State is not simply instrumental to the common well-being. It is not only an association of people with supreme power to co-ordinate the inherent diversities of strength, virtue, and purpose, of individuals and groups. It is that, but it is not that entirely. The State is also, in part, an instrument of exploitation. Through it, a comparatively few people, with privileges in property, and social monopolies, exploit all those outside the circle of their family, social group, or class. The superior power of the rich, whether hereditary or not, and of their relatives and protégés, in law, politics, the churches, medical assistance, or academic life, is patent. Such superiority even pretends to inborn merit: for what person, put into a position of superiority, especially when it is unmerited, will not speedily come to believe and act as though all is the result of his own virtue? Absolutisms which flourished until the French Revolution have not suffered complete transformation into commonwealths: many heirlooms and outposts, monopolies and exclusions, barricades and strategic positions, are still held in politics and society by a small minority, not on the basis of social utility, but by sheer force. Consider, for example, that it has taken nearly a century and a half of incessant assault to consummate universal suffrage!

Hence the long and jealous crescendo, the cry for Rights! Rights! Rights! a cry issuing from the propertyless and unprivileged, and elaborated by political philosophers. The cry was legitimate, and it was as proper for the academic student of human existence to encourage it and contrive the means of its satisfaction. But what, if, in the course of such a development, the essential truth was forgotten or obscured, the essential truth that in the long run there are no rights, economic or otherwise, without the fulfilment of the duties to create them? The bias of the State inevitably but tragically produced a bias in doctrine, and Rights were dissevered from Duties. That, in its formative period, was the particular error which Carlyle bitterly denounced—the severance of Rights from Duties. Was not, then, the development of a simple and indignant philosophy of Snatch! inevitable? It could have been argued that this was the proper implication, while to snatch consisted of taking from the improper privileges of the exploiters. But what, when the habit was acquired

of regarding government, not as a manager of social energies, an intermediary among clamant citizens, but as a self-creating and inexhaustible manufacturer of Rights, with little or no regard to the effort, the discipline, the training, the subordination, the mutual give and take, the patience and planning for the creation of those Rights? What, when the instrumental Duties were forgotten?

Then, indeed, the flood-gates were opened! Men easily forget that their claims cannot be fulfilled by the Government, but ultimately only by other men; interests soon cease, even if they ever learn, to realize the stress to which they are subjecting the rest of the community. The senses of demand are sharpened, the senses of obligation and reserve are dulled, if not entirely atrophied. Is it surprising, then, that, in critical times, statesmen cannot count upon the people? That the people's appetite for power and enjoyment is far in excess of their sense of social obligation? Is it surprising that the people are fickle, restlessly turning this way and that, away from the truth, which may mean a diminution of enjoyments and an increase of burdens? confiding first in one set of politicians and then in another? Is it surprising that crude witticisms regarding the stupidity, dishonesty and breach of faith of ministers or members of parliament are hugely enjoyed by the people, who, nevertheless, go on believing?

There is another factor of grave import. Given the mental condition of the electorate as a result of the features we have just indicated, there is no guarantee that capable statesmen will reach the seats of the highest authority. We need not recapitulate our analysis of the electoral process, based, as it is, upon the principle that no one who is not popular shall govern. We know, broadly, the arts required to win an electoral victory in each constituency; we know, broadly, the arts required to win the confidence of brothers in arms who have attained position by similar victories. They are definitely not guarantees of capacity to make laws, to administer, to ride the heavy tides and cross-currents of social existence. No one will pretend that the electoral process invariably produces men who have mastered the inter-related findings of all the various branches of social science, men who are clever connoisseurs of the relative weight and combination of the diverse human capacities and impulses, men who are clear-sighted prophets, and courageous enough to lead without first begging for a 'mandate'. The men are popular, and that is fundamentally important. They are almost as certainly incapable of governing a great centralized organization making vital decisions for millions of people. The experts may be at hand, but is the Minister capable of understanding and applying their advice? And even then, as the matter stands, a modern Ministry is not an impartial authority seeking the good of the commonwealth: it is peculiarly partisan, and ever militant. Two contemporary attempts

of great practical and theoretical importance have been made to overcome these difficulties. The Bolshevik experiment seeks a socialist community, but it denies the possibility of its advent without discarding the electoral incubus and its ideology. For Bolshevism is too impatient to attempt to convert those whose interests and philosophy contradict and obstruct its own, and it is too certain of its own morality and science to permit popular ignorance or bigotry to hold up its plans for generations until the people are taught to understand. Hence it can tolerate no free electorate, no free parliaments, no free press or parties or industry. The Fascist régime, to secure the peaceful development of capitalism, equally denies and prohibits the theory and practice of freedom of decision in industry and politics. For Fascism also believes that the *Duce* and his assistants know much better than ordinary men what is good for them, individually and as a community; nor will it wait to teach through books alone; nor, in a free Parliament and Press, seek to persuade its opponents that their morality, their science, and their personal ambitions, are replete with error. And it will certainly not compromise with them. It says that plain and open violence is to be preferred to the deliberate dishonesty and wholesale decerebration practised during election campaigns in 'free' countries.

Now, we might avoid such drastic alternatives, and find relief from anxieties, if there were a sufficient elasticity in three factors: the economic standards of modern society, the development of invention, and the population. But there is, owing to the failure of general morality and the institutions through which the ethical good should be taught, little or no elasticity in the standard of economic pleasure. On the contrary, the tendency is always towards the acquisition of more and more, and even to make a virtue of it. What line of reasoning is to-day powerful enough to secure a prompt and willing response to the reduction of the standard of living, even temporarily? Hence, when there is tension and the prospect of disruption, there is no prospect of relief. Those to whom the appeal is addressed are too penurious to understand, or have already been successfully and enjoyably inducted into an opposite conviction. We might secure a respite if we could at will quickly increase the product of industry, but this requires inventions in technique and organization. We cannot have these for the asking. We may encourage invention by patent rights, but the guarantee of royalties will not cause inventors to be born. That factor is inelastic. Thirdly, as regards population, we cannot in the prevailing state of morality suddenly annihilate or deport millions of momentarily unemployed fellow-citizens, nor, at will, suddenly increase their quantity, nor cause a decrease, in the short run, by educational or administrative measures. Still less can we apply positive eugenic measures, for even were we able to decide what type

of human being is desirable, we do not yet approach the knowledge to combine the genes in their proper strains—and even then there is the prospect of a revolution of the 'unfit'. In other words, we have pressure on three factors which are obstinately inelastic, and, if the human element is unreasonable, violent collision and collapse threaten. We have shown that other factors do favour unreasonable behaviour. At a certain point, where and when cannot be *exactly* determined (hence the anxiety), one must expect uncomfortable occurrences.

Perhaps we should have less to fear were there no international complications. But, in the world at large, the independence of states is a parallel to the atomization of the electorate in the domestic affairs of each country. The odd thing is that the philosophers who grow passionately indignant about the effects of group sovereignty when the group is a nation do not grow as passionately indignant about the dangers of sovereign groups and individuals within each national community. Of course, nations as well as individuals need teaching and discipline: a deliberately contrived world order is as essential as a deliberately contrived national order. As it is, the task of electorates and statesmen is made wellnigh impossible owing to the prides, antipathies and cultural conceit of national communities—a factor most difficult of calculation, and apt to bubble over the normal pressure-level which preserves the international equilibrium. The task is made difficult, also, because the elections of statesmen occur at different times in different countries, and are almost entirely concerned with the domestic situation; so that here there may be a Liberal Government, there a Government mainly of Catholics, in another place an extreme Conservative Government, and elsewhere a set of diverse dictatorships. There is neither a common conception of a world order, nor a preconcerted coincidence of governments which approach such a common conception.

Thus the pressures and counter-pressures, the seethings and the temperatures, are in a condition of health only upon the fulfilment of a multitude of conditions. There is always the danger that something will boil over, or crack, or catch fire.

Therefore, men like Wells look to a world-order directed by a single mind, not chosen by processes of popular election, and aided by assistants selected for their general governmental wisdom or expert knowledge. What are the implications of such a suggestion? His governor would be a man without any interest save that of good government, and he would select capable assistants regardless of their association with any political party. What difference would this make, compared with the present situation? By hypothesis the range of its control would be more comprehensive both in each country, and internationally, and it would be better informed. It would not

include measures and promises simply to please the ignorant or unjust bullies or to bolster up its own personal strength or prestige. It would avoid the friction and waste of time that result from the sheer militancy and exaggerations of party, parliamentary, and national tactics. It would avoid the stupidity of men who have reached office, not by outstanding virtues of character and wisdom, but by popularity alone. It would tide over a period of abnormal disintegration by a world-plan put into effect completely and at once.

Could this but be! But the electoral process is in the way—or rather, the philosophical assumptions that have produced that process; and there are reasons for believing that the world will not, and ought not, abandon it. For, in the first place, there are those who argue in part (but only in part with validity) that the lesson of the present discontents and disasters would be lost if a Genius saved us from them. They argue that these discontents and disasters will directly force lessons upon us, and cause us, in the future, to be more capable of dealing with their like by the method of self-government, and of freely creating the spiritual and institutional controls which will remove the *unnecessary* waste and friction from human society. Secondly, and more fundamentally, there *are* legitimate differences of opinion regarding human destiny. We live in an age when, perhaps, these are more confused and diverse than they need be: but let us be quite sure that even if less confused and various, they will always exist and will scatter men in different directions at different velocities, with different loves and hatreds and diverse devotions, and always with the possibility of violent and destructive collision.

On such grounds a single world-governor would soon be justifiably and forcibly challenged.

He would also be challenged, as any government may be challenged, not merely on grounds of differences in the interpretation of social generalizations, but also because there is too little material available for the making of such generalizations. The truth is, unfortunately, that we are able exactly to predict human behaviour only within a very narrow range. Politics and economics are inexact sciences, not because they repose upon facts that are not susceptible of exact measurement, though in many cases this is true, but because the range of facts is as vast as all human potentialities, and the correlations are therefore of unconquerable difficulty. The study of the social sciences, especially by methods of exact measurement, is of very recent birth. Not until 1800 or thereabouts were exact censuses taken; not until nearly the middle of the nineteenth century were established offices for the collection of vital statistics; so vital a research as that into the history of prices has only just been begun. Hence, when we get beyond a pitifully few measured

truths, and we do all too soon, we are thrown back on broad historical generalizations, and there and thereafter upon guesses and intuitions of the likely results of given causes. We cannot, like the biologist, seize and dissect, and control the observation of, tens of generations in two or three years (as with the fly *drosophila*, seventy generations in two years): and as soon as we begin to watch human beings closely they change their normal behaviour in defence. We are obliged to acquire our knowledge by centuries of experience, mostly without scientific controls. And even then, since government is concerned with the whole field of human nature, it is little use knowing, and being able to control, one factor, unless there is an equal capacity to manage those which are inter-related with it. Hence the difficulty of government, and the presumption of even the stupid and ignorant to hold a different point of view, and find adherents. 'There is light enough', said Pascal, 'for those who wish to see, and darkness enough for those of the opposite disposition.' There is no yard-measure to overcome doubts and scruples, and even where there is, it does not appear in the tangible and obvious form of a piece of wood or steel, but as a long and intricate syllogism couched in a subtle combination of words not employed in their popular sense, or in a tangle of mathematical symbols.

If this is so, it is obviously dangerous to centralize decisions in the hands of one man or a small group of men. For, instead of the necessary shocks and strains of the quest for adjustments and compensations being distributed, as they are, for example, in the free price-controls of modern economic enterprise, instead of many free channels and safety valves and outlets, the strain would accumulate centrally, and the pivot would be shaken by the cumulative concourse and massed pressure of all individual dissatisfactions. Moreover, if we think economically, solely, there is much to be said for leaving traders very much to themselves, lest *national* sentiment introduce factors of embroilment. This, assuming, of course, that nationality is not overcome by sound international arrangements.

Yet efficient institutions of control have been created, and can be created. This book has failed if it has not shown that. But *the task is not simple*, even when it is narrowed down to the establishment of some trifling new control. Nor can it succeed immediately upon a swift and certain demonstration of measured truths. Hence friction, muddle, vacillation, and many trials and errors. Consider the successive retreats of the rulers of Russia! (Though we must not forget their successes.) The Genius to-day, acting in the midst of stubborn differences of aspiration and will, would hardly be better off than a collection of experts with dictatorial power, though he might, for a short time, do better than popular ministers at the mercy of a modern electorate.

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the public services, in academic life, must be wide and encouragingly open, unencumbered by poverty, class, family, snobbery, university cliquism, and resolutely closed to those who have the trappings of all other claims but not capacity. In economic processes, controls and discipline unnecessary to the nature of the function, which frequently arise out of the personal temper of the owner or manager, must be abolished, and conversely, within the nature of the function, there must be a hard and intelligent day's work in which hours, wages and intensity of application must vary with productivity, up or down. All this would operate with vigour and elasticity only if the leisured ceased their wonted laziness, and made more adequate contributions to science, literature and art. Let it be remembered that the author of the *Critique of Pure Reason* lived in abject poverty for most of his years ; that *ought* to be remembered in a day of high salaries and wealthy research foundations. It is clear, also, that a much larger scope of governmental activity, whether of mere control or direct management, is essential, in both national and international spheres, to reduce friction and waste, in both consumption and production. But its success depends, as we have amply demonstrated elsewhere, upon a willing people, more ample knowledge, and abnormally capable experts. Political machinery, in its narrower sense, needs reform : a much more careful control of the sanitary condition of the Press and electoral propaganda is required ; the age for the franchise should be raised to twenty-five until we have experienced widespread continued and adult education for at least one generation ; there should be a test for prospective parliamentary candidates, and only those (a sufficient number, of course) who qualified should be permitted to appear upon the panel of each party for selection by headquarters and local associations.

Above all, everything depends upon Education. If this fails, nothing else will succeed. Since everybody, not certified as insane, has been formally declared to be a statesman, the implication is plain. You have to teach. . . . You have to teach the Social Sciences, at least ; you have to teach all that is in this book, and all that lies in its background, on its outskirts, and beyond ; and you have to teach it thoroughly. Either this must be done or the electoral process, even as a negative ultimate check, which is the lowest potency the democratic theorist is willing to allow it, even this, is an enormous nation-wide confidence-trick, mass cuckoldry, an orgy, which any knave can convert to his doctrines and interests so long as he proffers pleasures without duties. Either this, or you may as well immediately disfranchise 95 per cent of the voters. This great blundering blind giant, Demos, can be prodded into supporting the most suicidal of policies by those who take advantage of his blind-

ness, and, in the long run, the giant may trample upon his leaders, wise as well as stupid, friends as well as enemies, out of sheer ignorance. Better to disfranchise legally, and produce at least stable government, than disfranchise by leaving brains and characters uncultivated, and produce unwisdom and instability. Of course, the day of disfranchisement is for ever gone. But really to enfranchise, would require about two million Socratic groups (two million leaders with each from ten to fifteen students) in a country the size of England. Imagine all the difficulties this involves, and that is the measure of the deficiency of contemporary elections. Instead of getting nearer to Socratic elections, we are receding from them, owing to the technical nature of broadcasting, which allows leaders to speak without interrogation or discussion. The only hope lies in a type of education which will not be exclusively concerned to bolster up the present form of society, nor simply to assault it, but to teach the foundation of all social existence: that Rights and Duties are correlative.

Even this is vain unless the few score scientists are true to their function. Who, if not they, will tell the absolute, immaculate, independent truth, in a partisan and belligerent society? Who, outside a handful of men and women, even understand what is meant by truth and objective analysis? No large-scale society which attempts to live by millions of reciprocations, extensive, complex, changing, and remote in time and place, can live and control its life, without the aid of its historians, its analysts of contemporary processes, its statistical observers, and its philosophical prognosticators. The temptations to betray the professorial function are unfortunately as insidious as they are numerous and powerful. The urgencies of private millennial plans; the desire to tell people only pleasant things, and to be agreeable; political and national friendship; the intoxication of public applause; the *éclat* of a smart aphorism; the lust of political management and the joy of being 'boss' with hands on everybody's fate; fear of annoying the dispensers of place and prestige; mental laziness or supine character—these are but a few of truth's rivals. Pope's *Essay on Criticism* describes a good many more. There is everything to promote untruth, to inspire exaggerations and suppressions, to obscure the light of the intellect. The way of intellectual chastity is hard; but if, as Julian Benda has amply shown, and as everyday experience amply confirms, the guardians of the sacred flame of objectivity commit treason, then the world is indeed lost. Who else will then stand and speak serenely above brutal and dividing passions; and teach that causes inevitably produce effects, and that to will certain ends is consciously or unconsciously to support the instrumental means? Political distortion engenders not only harmful practice, but creates schools of

opposed distortions, and a presumption in favour of the propriety of exaggeration. Where teachers seek, not Truth, but Power, they put out our eyes. The criterion among independent scholars, especially in the higher levels, whether in society or in the Universities, should surely be perfect fulfilment (though not immurement) in the life speculative ; that, and that alone. Of this Aristotle said :

'If, then, intellect be divine as compared with man, the life which consists in the exercise of this faculty will also be divine, in comparison with human life. Nevertheless, instead of listening to those who advise us as men and mortals not to lift our thoughts above what is human and mortal, we ought rather, as far as possible, to put off our mortality, and make every effort to live in the exercise of the highest of faculties ; for though it is but a small part of us, yet in power and value it far surpasses all the rest. . . .'

Nor will the adventure of government end there. When all these things are accomplished, and the pangs of renewal long forgotten, the fundamental stress will reassert itself. For the battles of bread and the circus are more easily settled than the battle of ultimate spiritual creeds. Science, for example, has challenged religion ; but to-day the scientists themselves have become sceptics regarding Science, the goddess with the wide-open eyes—but that is a story yet to be told, and to become true and effective for the political behaviour of the masses. Yet these immediate things still remain to be done. The outcome, and the new destinations, and the forms of government appropriate thereto—these dwell in you.

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